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No. 467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ARROW CARRIER CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the District of New Jersey

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JURISDICTIONAL STATEMENT

CHRISTIAN V. GRAF
407 North Front Street
Harrisburg, Pennsylvania

JOHN HAND
127 Market Street
Paterson, New Jersey

SPENCER R. LIVERANT
138 East Market Street
York, Pennsylvania

Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	5
Statement of the Case	6
The Questions Are Substantial	9
(a) The Conclusion of Subterfuge Is Unwarranted	9
(b) The District Court's Decision Is Contrary to an Act of Congress and to Prior Decisions Establishing Commerce "Between Places in the Same State Through Another State" as Interstate Commerce	15
(c) A Decision in This Proceeding Will Clarify the Law and Tend to Eliminate Further Confusion and Litigation on the Subject of Interstate Commerce	19
Conclusion	21
APPENDICES:	
Appendix A: Opinion of the United States District Court	1a
Appendix B: Findings of Fact and Conclusions of Law of the United States District Court	14a
Appendix C: Order of the United States District Court	15a
Appendix D: Report of the Commission on Reconsideration Issued by the Interstate Commerce Commission, 88 M.C.C. 745	17a

INDEX OF AUTHORITIES

Page

JUDICIAL DECISIONS CITED:

Alcoa S. S. Co. v. United States, 338 U.S. 421; 70 S. Ct. 190; 94 L. Ed. 225 20
American Trucking Assoc. v. Frisco Transp. Co., 358 U.S. 133 (1958) 2
American Trucking Assoc., Inc., et al. v. United States, et al, 364 U.S. 1 (1960) 2
Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Commission, 163 Pa. Superior Ct. 215, 6 A. 2d 589 15
Boone v. Kerr-Magee Oil Industries, C.C.A., 10th Circuit, 217 Fed. 63 14
Central Greyhound Lines v. Mealey, 334 U.S. 563 (1948) 19, 20
Eichholz v. Public Service Commission of Missouri, 306 U.S. 268 (1939) 11, 12, 13, 20
Florida Lime and Avocado Growers v. Jacobson, 362 U.S. 73 (1960) 2
Frozen Food Express v. United States, 351 U.S. 40 (1956) 2
Hanley v. Kansas City Southern Ry. Co., 187 U.S. 617 15
T. W. Jenkins and Co. v. Anaheim Sugar Co., C.C.A. 9th Circuit, 247 Fed. 958 14
Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission, 361 U.S. 11 20
Jones Motor Co., Inc. v. Pennsylvania Public Utility Commission, 361 U.S. 904 20
Kalpakis v. Kalpakis, 221 La. 739, 60 So. 2d 217 14
Los Angeles Fisheries v. Crook, 47 F. 2d 1031, 1035 ... 14
Ludecke v. Watkins, 335 U.S. 160, 162; 68 S. Ct. 1429; 92 L. Ed. 1881 20
Minneapolis and St. L. R. Co. v. United States, 361 U.S. 173 (1959) 2
Pennsylvania Public Utility Commission v. Atlantic Freight Lines, Inc., Equity Docket Number 20008, C. D. 267 17
Roundtree v. Terrell, 22 F. Supp. 297 (1938) 18, 20
Service Storage & Transfer Co., Inc. v. Commonwealth of Virginia, 359 U.S. 171 ..... 10, 12, 19, 20
United States, et al. v. Henry E. Drum, et al, 368 U.S. 370 (1962) 2
Weininger v. Metropolitan Fire Insurance Co., 359 Ill. 584, 195 N.E. 420 14
Western Union Telegraph Company v. Speight, 254 U.S. 17 ..... 11, 14, 19, 20

Page

INTERSTATE COMMERCE COMMISSION CASES CITED:

Atlantic Freight Lines, Inc.—Petition for Declaratory Order, MC. 77477, 51 M.C.C. 175 ..... 15, 16, 17
Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 780 17
H. C. Gabler, Inc., Extension—Cement from Maryland and Pennsylvania Counties, MC. 27817, Sub 35; 86 M.C.C. 447 13
Pennsylvania Public Utility Commission v. Arrow Carrier Corporation and Hudson Transportation Co., 88 M.C.C. 745 (Dissent) 13

PENNSYLVANIA PUBLIC UTILITY COMMISSION CASES CITED:

Rule Issued Against Trans-Bridge Lines, Inc., A. 74567, Folder 3, Am-A, 39 Pa. P.U.C. 111 17

STATUTES CITED

United States Judicial Code—

Title 28 U.S. Code Sections:

1253 2
1336 2
1398 2
2101(b) 2
2284 2
2321 2
2322 2
2325 2

Interstate Commerce Act—

Sections	Title 49 U.S. Code Sections	
203(a)(10)	303(a)(10)	2, 5, 15, 20, 21
203(c)	303(c)	3
204(c)	304(c)	3
206(a)(1)	306(a)(1)	4
209(a)(1)	309(a)(1)	12

TEXT BOOKS CITED

20 American Jurisprudence 229 14

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On Appeal from the United States District Court for the District of New Jersey

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Opinion of the United States District Court for the District of New Jersey was filed June 14, 1963 and is attached hereto as Appendix A. The findings of fact and conclusions of law entered by the said Court was filed June 14, 1963 and is attached hereto as Appendix B. The Order entered by the said Court was also filed June 14, 1963 and is attached hereto as Appendix C. The "Report of the Commission on Reconsideration" issued by the Interstate Commerce Commission under service date of March 27, 1962 is printed at 88 M.C.C. 745, and is attached hereto as Appendix D.

JURISDICTION

The action before the United States District Court was brought pursuant to Title 28, United States Code, Sections 1336, 1398, 2284, 2321, 2322 and 2325, to vacate, set aside and annul an Order of the Interstate Commerce Commission. The Opinion and Order of the three judge District Court was entered on June 14, 1963 and Notice of Appeal was filed in that Court by Arrow Carrier Corporation, Appellant, on July 15, 1963.

The jurisdiction of the Supreme Court to review this Opinion and Order by direct Appeal is conferred by Title 28 U.S.C., Sections 1253 and 2101(b) and is sustained by the following decisions: *United States, et al,* v. *Henry E. Drum, et al,* 368 U.S. 370 (1962); *Frozen Food Express* v. *United States,* 351 U.S. 40 (1956); *American Trucking Assoc.* v. *Frisco Transp. Co.,* 358 U.S. 133 (1958); *Minneapolis and St. L. R. Co.* v. *United States,* 361 U.S. 173 (1959); *Florida Lime and Avocado Growers* v. *Jacobson,* 362 U.S. 73 (1960); and *American Trucking Assoc. Inc., et al,* v. *United States, et al,* 364 U.S. 1 (1960).

STATUTES INVOLVED

The provisions of the Interstate Commerce Act pertinent to this proceeding are as follows:

DEFINITIONS

Section 203(a)(10) of Part II of the Interstate Commerce Act (49 U. S. C. 303(a)(10))

> "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce

moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water".

Section 203(c) of Part II of the Interstate Commerce Act (49 U. S. C. 303(c))

"Except as provided in section 302(c) of this title, subsection (b) of this section, in the exception in subsection (a) (14) of this section, and in the second proviso in section 306(a) (1) of this title, no person shall enage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation, nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person".

POWERS AND DUTIES.

Section 204(c) of Part II of the Interstate Commerce Act (49 U. S. C. 304(c))

"Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provi-

sion or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint".

CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY

Section 206(a)(1) of Part II of the Interstate Commerce Act (49 U. S. C. 306(a)(1))

"Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: Provided, however, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and

within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful".

QUESTIONS PRESENTED

The following questions are presented for determination:

1. Did the District Court err in finding a subterfuge on the part of Plaintiff, in view of its operations pursuant to valid interstate Certificates, which, on their face, authorize the challenged transportation?

2. Was there direct evidence of bad faith to support the finding of subterfuge on the part of Plaintiff made by the District Court?

3. Did the District Court erroneously place the burden of proof upon Arrow Carrier Corporation rather than upon Pennsylvania Public Utility Commission?

4. Is the challenged transportation "between places in the same State through another State" interstate commerce, in accordance with the statutory definition contained in Section 203(a)(10) of Part II of the Interstate Commerce Act (Title 49 U. S. C., Section 303(a)(10))?

STATEMENT OF THE CASE

This cause arose upon Complaint and Petition. Arrow Carrier Corporation (Arrow) filed a Petition with the Interstate Commerce Commission for a Declaratory Order that Arrow, under its interstate authority is authorized to conduct operations between Pennsylvania origins and Pennsylvania destinations over its certificated interstate routes traversing the State of New Jersey. Pennsylvania Public Utility Commission (Pennsylvania Commission) filed a Complaint with the Interstate Commerce Commission naming Arrow as Defendant and averring that operations by Arrow in transporting property from Pennsylvania origins to Pennsylvania destinations over routes lying partly in New Jersey were beyond the scope of its interstate authority and constituted a subterfuge.

The proceedings were heard on a consolidated record, together with a similar Petition filed by Hudson Transportation Company and a similar Complaint by the Pennsylvania Commission directed against Hudson Transportation Company.

The facts as presented at the hearing were as follows:

The Pennsylvania Commission presented its investigators who testified that they followed certain vehicles owned or operated by Arrow, but did not relate that testimony to any of the specific movements mentioned in the Complaint. The distance and driving times over the challenged route and over routes lying wholly within Pennsylvania were presented.

Arrow, in its presentation, established the existence of its Certificates; pointed out the portions relied upon to support its contention that the grants of authority

were properly tacked or combined; identified its terminals; indicated that all traffic transported was moved pursuant to published interstate routes and published interstate rates; and explained its mode of operation.

The traffic in question moved from Philadelphia, Pa. via road vehicle over U. S. Highway 1 to Trenton, N. J., over New Jersey Highway 69 to Clinton, N. J., over U. S. Highway 22 to Phillipsburg, N. J. and Allentown, Pa. and over the same route in the reverse direction. Regular round trip road runs are operated between Philadelphia, Pa. and Carlstadt, N. J.; between Carlstadt, N. J. and Scranton, Pa., via Phillipsburg, N. J.; and between Carlstadt, N. J. and Hazleton, Williamsport, Shamokin and Schuylkill Haven, Pa., all via Phillipsburg, N. J. and Allentown, Pa. All road runs originating at Carlstadt, except the Carlstadt-Philadelphia run, pass through Allentown, Pa. or Phillipsburg, N. J. and all of these runs stop at either the Phillipsburg, N. J. or Allentown, Pa. terminals for changes in routing instructions or to pickup freight, with the further exception of full truck loads destined to Scranton, Pa.

After the aforementioned road runs from Philadelphia, Pa. to Allentown, Pa. reach Allentown, the freight is unloaded and transferred to the appropriate road run from Carlstadt, N. J. destined to the terminal serving the destination point of the shipment, such as Hazleton, Williamsport, Shamokin or Schuylkill Haven, Pa. Pick up and delivery runs operate radially out of each of these Pennsylvania terminals and out of the Phillipsburg, N. J. terminal. It is on these pick up trucks that freight is gathered from shippers or delivered to the ultimate consignee.

The freight delivered at the Philadelphia, Pa. terminal by the road run from Allentown, Pa. is similarly delivered by local delivery trucks which also pick up freight.

Solicitors are maintained at all terminals and the solicitors seek freight for the Hudson Valley of New York, for southern New Jersey, for New York City, for export and for interline traffic with other carriers to New England and to the southern states, as well as to and from points in Pennsylvania.

A representative of Arrow Carrier Corporation testified that absent any regulation, his company would utilize routes lying wholly in Pennsylvania. However, all of the challenged transportation from Pennsylvania origins to Pennsylvania destinations moved over the above-specified certificated interstate routes of Arrow, via New Jersey.

The Hearing Examiner recommended denial of the Petition for Declaratory Order, found that Arrow's operations under its interstate Certificates constituted a subterfuge and recommended the issuance of a Cease and Desist Order. After Exceptions, Division 1 of the Interstate Commerce Commission denied the Petition for Declaratory Order, sustained the Examiner's finding of subterfuge but indicated that there was no violation of the Interstate Commerce Act and dismissed the Complaint.

Subsequently, the proceedings were re-opened and the Interstate Commerce Commission issued its Report denying Arrow's Petition for Declaratory Order, sustaining the Complaint and issuing a Cease and Desist Order. The three judge District Court affirmed the Interstate Commerce Commission.

THE QUESTIONS ARE SUBSTANTIAL

(a) The Conclusion of Subterfuge Is Unwarranted

The District Court in concluding that the operations of Arrow Carrier Corporation constituted a subterfuge predicated its decision upon the following factors: that the combination of Certificates constituted artificially contrived arrangements (App. 11a) resulting in a "mystic maze" (App. 11a-12a); that the route employed and the driving time were almost double a direct intrastate operation (App. 8a); that absent regulation, direct Pennsylvania intrastate routes would be employed; and that the routes were not logical and normal operations (App. 11a). The Court did not point in its Opinion to any direct evidence of bad faith, such as fraud in the procurement or operation of the Certificates, deceit or concealment.

These bases upon which the ultimate conclusion rests are not supported either by the facts or by the law.

At no point in the proceedings before the Interstate Commerce Commission or before the District Court was there any challenge raised as to the validity of the Certificates of Arrow Carrier Corporation. Specifically, the Interstate Commerce Commission did not find that the combination of the authorities violated any established principles with respect to the tacking or combination thereof. How then could there be a "mystic maze" in the combination?

Neither the Court nor the Interstate Commerce Commission explained the manner in which the combination of authorities violated any of the principles applicable to tacking or combination of authorities, statutory or otherwise. How then could the combination constitute an artificial and contrived arrangement?

Since there are no legal principles violated and since there has been no mention made of any section of the *Interstate Commerce* Act which Arrow Carrier Corporation is alleged to have violated, the action in combining the authorities becomes a proper and legal one in the absence of direct evidence of bad faith, such as fraud, deceit or concealment.

We thus have a situation in which valid subsisting Certificates are properly tacked and combined, but accompanied by a conclusion of subterfuge in the resultant transportation, despite the absence of affirmative evidence of bad faith, such as concealment, fraud or deceit.

To the extent that the District Court considered the question of circuity of route and driving time as indicative of subterfuge, the law does not sustain such a conclusion. Your Honorable Court in *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, 359 U.S. 171, indicated that subterfuge may not be predicated upon these factors, even when the routes are twice as long as the shortest possible distance, unless there is present direct evidence of bad faith:

> "It contends that petitioner's circuitous and unnecessarily long routes were a mere subterfuge to escape intrastate regulation and evade its jurisdiction. Aside from the testimony of highway officers as to the actual shipments, none of which is disputed, the Commonwealth's evidence consisted solely of maps substantiating its position that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. *However, it offered no direct evidence of bad faith on the part of petitioner* in moving *its traffic through Bluefield, West Virginia*" (Emphasis supplied).

The District Court also predicated its conclusion of subterfuge upon testimony to the effect that absent regulation, Arrow Carrier Corporation would operate over routes lying wholly within Pennsylvania (App. 8a). This, however, constitutes an hypothesis contrary to fact, in that there is regulation. To this extent as well, the reasoning is unsound.

When the District Court predicated its conclusion, in part, upon the fact that the routes in question had not been shown to be logical and normal operations, it reversed the burden of proof and imposed it upon Arrow Carrier Corporation, contrary to *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17. In that case, a suit was brought in the State Court against the telegraph company to recover for mental suffering caused by an error in delivering a telegraphic message. The message was from Greenville, North Carolina to Rosemary, North Carolina and was transmitted via Roanoke and Norfolk, Virginia. The jury found that the message was sent out of North Carolina into Virginia for the purpose of fraudulently evading liability under the laws of North Carolina. Nevertheless, the presiding judge set aside the verdict as a matter of law ordered a non-suit. On Appeal, the North Carolina Supreme Court directed that judgment be entered on the verdict.

In reversing, your Honorable Court stated that even if motives were material: "The burden was on the plaintiff to make out her case. Moreover the motive would not have made the business intrastate." (At Page 19)

The District Court has erroneously relied upon *Eichholz* v. *Public Service Commission of Missouri*, 306 U.S. 268, to support its conclusion of subterfuge. In that

proceeding, Eichholz, prior to 1935, received a Permit from the Missouri Public Service Commission to operate as a motor carrier of property in interstate commerce. Part II of the Interstate Commerce Act regulating motor carriers was passed in 1935 and previous thereto the Federal Government had not subjected interstate motor carriers to regulation. Accordingly, such operations properly could be regulated by the several states.

After passage of Part II of the Interstate Commerce Act, Eichholz applied for a Grandfather Permit, pursuant to Section 209(a)(1) of said Act. It was during the pendency of that application that the Missouri Commission had determined certain of Eichholz's operations to be intrastate in nature. Upon such determination, the Missouri Interstate Permit of Eichholz was withdrawn. On Appeal the action of the Missouri Commission was sustained by your Honorable Court. In the course of the Opinion, at Page 273, your Honorable Court stated:

> "When the Commission revoked the permit, the Interstate Commerce Commission had not acted upon appellant's application under the Federal Motor Carrier Act and meanwhile the authority of the state body to take appropriate action under the state law to enforce reasonable regulations of traffic upon the state highways had not been superseded".

Your Honorable Court subsequently construed the *Eichholz case* in *Service Storage and Transfer Co.* v. *Commonwealth of Virginia*, 359 U.S. 171, *supra*, as follows:

> "Nor is *Eichholz* v. *Public Service Comm'n*, 306 U.S. 268 (1939) to the contrary. There Missouri

> revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of *creating* an interstate operation. Eichholz, however, had no certificate from the Interstate Commerce Commission, and *this court's opinion was premised on this fact rather than that the interstate operations were merely a subterfuge and hence not bona fide*" (Emphasis supplied).

It is evident that the *Eichholz case* did not turn upon the question of subterfuge, but rather upon the question of concurrent jurisdiction. The reliance by the District Court upon the *Eichholz case* to sustain its conclusion of subterfuge constituted error.

The conclusion of subterfuge in the instant matter cannot be reconciled with prior decisions of the Interstate Commerce Commission, wherein specific authority has been granted to a carrier to perform an interstate service between points in a single state through another state. In *H. C. Gabler, Inc., Extension—Cement from Maryland and Pennsylvania Counties*, MC. 27817, Sub. 35; 86 M.C.C. 447, some of the applicants involved received authority from cement producing origins in a specific state to destinations in the same state. By way of explanation, the Interstate Commerce Commission stated:

> "Authority to serve destination points in the same State as the origin is located is granted uniformly where sought, for the evidence establishes that such authority is generally required to enable applicants to utilize more feasible and economical interstate routes and to accord shippers greater flexibility in diverting shipments already en route" (86 M.C.C. 447, 484).

The dissent to the Order of the Interstate Commerce Commission also recognizes that the Commission by

granting such certificates was encouraging the very type of operation which the majority of the Commission condemned (Commissioner Herring's dissent; Appendix D, p. 31a).

The conclusion of subterfuge is not warranted for other reasons. The law presumes in favor of the integrity of conduct on the part of one accused. Generally speaking, in the absence of any proof to the contrary, there is a presumption that all men act fairly, honestly, and in good faith. 20 *American Jurisprudence* 229, citing *T. W. Jenkins and Co.* v. *Anaheim Sugar Co.*, C.C.A., 9th Circuit, 247 Fed. 958; *Weininger* v. *Metropolitan Fire Insurance Co.*, 359 Ill. 584, 195 NE 420; *Boone* v. *Kerr-Magee Oil Industries*, C.C.A., 10th Circuit, 217 Fed. 63; *Kalpakis* v. *Kalpakis*, 221 La. 739, 60 So. 2d 217.

The Circuit Court of Appeals of the 9th Circuit in a cause involving purchase of corporate stock had before it a case where subterfuge was expressly alleged, as in the present case, but also like the present case, there was no affirmative evidence thereof. The Circuit Court of Appeals in reversing the lower court said:

> "There is nothing in the pleadings and certainly nothing in the evidence to support the contention that Appellant tried to keep anything from the knowledge of the Appellee or tried to get him to sign the letter by unfair means." *Los Angeles Fisheries* v. *Crook*, 47 F. 2d 1031, 1035.

In *Western Union Telegraph Company* v. *Speight*, 254 U.S. 17, *supra*, your Honorable Court indicated that motive, even if material, could not have transformed any interstate commerce into intrastate com-

merce. Further, it was declared: "The transmission of a message through two states is interstate commerce as a matter of fact. *Hanley* v. *Kansas City Southern Ry. Co.*, 187 U.S. 617".

For all of these reasons, the conclusion of subterfuge in the instant matter was unwarranted and contrary to law.

(b) The District Court's Decision Is Contrary to an Act of Congress and to Prior Decisions Establishing Commerce "Between Places in the Same State Through Another State" as Interstate Commerce

The definition of interstate commerce as commerce "between places in the same state through another state" was established by the Congress in Section 203 (a)(10) of Part II of the Interstate Commerce Act (Title 49 U.S.C., Section 303(a)(10)) and has been interpreted time after time by the Interstate Commerce Commission and by your Honorable Court.

One case having particular applicability here is the *Atlantic Freight Lines, Inc.* proceeding. In that case, Pennsylvania Public Utility Commission instituted a Complaint before itself against the carrier, averring that transportation between two Pennsylvania points, via an interstate certificated route traversing another state, constituted intrastate commerce and, hence, was illegal. The case was appealed to the Superior Court of Pennsylvania, which sustained the Pennsylvania Commission. *Atlantic Freight Lines, Inc.* v. *Pennsylvania Public Utility Commission*, 163 Pa. Superior Ct. 215, 6 A. 2d 589. Thereafter, the Supreme Court of Pennsylvania refused allocatur and your Honorable Court denied certiorari. Atlantic Freight Lines, Inc. then filed a Petition for Declaratory Order (similar to the one filed by Arrow Carrier Corporation in this

proceeding), docketed by said Commission at MC-77477, 51 M.C.C. 175. The Interstate Commerce Commission took jurisdiction and found for Atlantic Freight Lines, Inc.

In so doing, the Interstate Commerce Commission pointed out that the Certificates of Atlantic Freight Lines, Inc. contained the following language preceding the outline of the authority granted:

> "IT IS FURTHER ORDERED: that the transportation service to be performed by said carrier in interstate or foreign commerce shall be as specified below:"

The identical language is to be found in the Arrow Carrier Certificates. In the *Atlantic Freight Lines, Inc. Petition for Declaratory Order* case, *supra*, the Interstate Commerce Commission indicated that such language:

> ". . . serves as a factual finding that the operations authorized in the certificates are in interstate or foreign commerce and within our jurisdiction and that we have assumed jurisdiction over, and propose to regulate, them in accordance with and in furtherance of the purposes of the Interstate Commerce Act" (51 M.C.C. 175, 187).

In the *Atlantic Freight Lines* case the interstate route was longer than the most direct route between the Pennsylvania points involved (51 M.C.C. 175, 179), as is true in the instant case. In the *Atlantic Freight Lines* case, the driving time was greater over the interstate route (51 M.C.C. 175, 179), a factor also involved here. There, as here, the carrier charged the appropriate interstate rate (51 M.C.C. 175, 179; N.T. 201-202). In both cases, the carrier involved sought a

declaratory order. In the *Atlantic Freight Lines* case, supra, the Declaratory Order was granted. In the instant case, it was not.

The *Atlantic Freight Lines* litigation did not terminate at this point. After the issuance of the Interstate Commerce Commission's Order in favor of *Atlantic Freight Lines* in the Declaratory Order proceedings, *supra*, Pennsylvania Public Utility Commission instituted an equity action against *Atlantic Freight Lines, Inc.* in the Court of Common Pleas of Dauphin County, Pennsylvania, docketed at Equity Docket Number 20008, Commonwealth Docket Number 267. In this proceeding, Pennsylvania Public Utility Commission entered into a Consent Decree, whereunder *Atlantic Freight Lines, Inc.* was permitted to operate between two Pennsylvania points via interstate routes of movement!

The Interstate Commerce Commission recognized this same doctrine in *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M.C.C. 780, wherein a question arose as to whether transportation from Atlanta, Georgia to Fort Benning, Georgia via Opelika, Alabama constituted interstate commerce. In deciding that it did, the Commission stated:

> ". . . there can be no question but that property transported from Atlanta to Fort Benning via Opelika moves in interstate commerce. This is seen from the definition of that term in Section 203(a)(10) of the Motor Carrier Act of 1935, which reads as follows:" (Act cited) (24 M.C.C. 780, 782).

Complainant also has recognized the validity of the congessional definition. In *Rule Issued Against Trans-Bridge Lines, Inc.*, A. 74567, Folder 3, Am-A; 39 Pa.

P.U.C. 111, the Pennsylvania Commission issued a Rule to Show Cause why the Certificates of Trans-Bridge Lines, Inc. should not be cancelled or other penalties invoked because that carrier had transported a group of persons from East Stroudsburg, Pennsylvania to Erie, Pennsylvania to the American Legion Convention. In the course of its decision, the Pennsylvania Commission stated:

> "A further inquiry into the facts, made after our aforesaid order, discloses that the movement was from East Stroudsburg to Syracuse and Lake Chatauqua, New York, and thence to Erie, Pennsylvania. The movement into New York State was made at the written request of the Legion members under date of March 16, 1961, wherein the membership desired a sight-seeing tour in New York State en route to Erie, Pennsylvania. The respondent complied with the request made by the Legion.
>
> It would appear from the aforementioned new information before us that *the movement was interstate although the ultimate destination point was Erie, Pennsylvania*" (Page 112) (Emphasis supplied).

Your Honorable Court likewise has construed transportation between places in the same state via another state to be interstate commerce. In *Roundtree* v. *Terrell*, 22 F. Supp. 297 (1938, Roundtree operated trucks from Dallas, Texas to Texarkana, Arkansas, where his terminals are located and arranged for the ultimate distribution of traffic from that point to Texarkana, Texas. In holding that this operation was interstate commerce, it was stated:

> "The freight passed from Texas into Arkansas. When it does that, it is interstate commerce" (At Page 299).

In *Central Greyhound Lines* v. *Mealey*, 334 U.S. 563 (1948), the question was raised as to whether a New York State tax applied with respect to operations beginning at a point in New York and ending at a point in the same state, over routes traversing Pennsylvania. There it was stated that:

> "It is too late in the day to deny that transportation which leaves the state and enters another state is commerce among the several states simply because the points from and to are in the same state" (334 U.S. 655-656).

In *Western Union Telegraph Co.* v. *Speight*, 254 U.S. 17, *supra*, your Honorable Court held that the transmission of a message between places in the same state through another state was interstate commerce as a matter of fact and added that even motive would not have made the business intrastate in character.

The Order appealed from has swept away and nullified all of these decisions, resulting in confusion in the transportation industry.

(c) A Decision in This Proceeding Will Clarify the Law and Tend to Eliminate Further Confusion and Litigation on the Subject of Interstate Commerce

It may be argued that the questions herein presented are foreclosed by prior decisions of your Honorable Court and that clarification of the law is not desirable. The confusion which has arisen in connection with *Service Storage and Transfer Co., Inc.* v. *Commonwealth of Virginia*, 359 U.S. 171 is apparent from the Opinion of the District Court. We contend that the *Service Storage case*, *supra*, indicated that mere circuity of route absent direct evidence of bad faith could not establish subterfuge. We further contend that the *Service Storage case*, *supra*, made it clear that

Eichholz v. *Public Service Commission of Missouri*, 306 U.S. 268, *supra*, was decided on the basis of concurrent jurisdiction and not subterfuge.

It originally appeared that the *Service Storage case*, *supra*, and *Jones Motor Co., Inc.* v. *Pennsylvania Public Utility Commission*, 361 U.S. 11 and 361 U.S. 904, had settled the controversy surrounding the interpretation of Section 203(a)(10). However, the Order of the District Court appears to be in conflict and further appears to cast doubt upon these decisions and other decisions of your Honorable Court, including *Central Greyhound Lines* v. *Mealey*, *supra*, *Roundtree* v. *Terrell*, *supra*, and *Western Union Telegraph Co.* v. *Speight*, *supra*.

Rather than foreclosing a determination of the questions herein presented, the prior decisions of your Honorable Court warrant a decision in this proceeding in order to clarify the law which has been clouded by the Order appealed from.

A clarification of the questions here involved also would tend to eliminate further litigation before the Interstate Commerce Commission and the lower courts. On this basis, probable jurisdiction is indicated.

In *Alcoa S. S. Co.* v. *U. S.*, 338 U.S. 421, 423; 70 S. Ct. 190; 94 L. Ed. 225, this Court stated:

> "We granted certiorari because determination of the issue raised here will guide adjustment of a large body of similar claims now pending".

In similar circumstances, certiorari was granted in *Ludecke* v. *Watkins*, 335 U.S. 160, 162; 68 S. Ct. 1429; 92 L. Ed. 1881, where it was stated by the Court:

> "We are advised that there are 530 alien enemies ordered to depart from the United States, whose

disposition awaits the outcome of this case". (Footnote 2, Page 162).

Appellants urge that your Honorable Court by fully disposing of the questions here presented will effectively lessen further litigation before the Interstate Commerce Commission and the Federal Courts relative to an interpretation of Section 203(a)(10), as to what constitutes interstate commerce.

CONCLUSION

The questions presented by this Appeal are substantial and require plenary consideration, with briefs and oral argument for their resolution.

Probable jurisdiction should be noted.

Respectfully submitted,

CHRISTIAN V. GRAF
407 North Front Street
Harrisburg, Pennsylvania

JOHN HAND
127 Market Street
Paterson, New Jersey

SPENCER R. LIVERANT
138 East Market Street
York, Pennsylvania

Of Counsel

August 29, 1963

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 362-62

HUDSON TRANSPORTATION COMPANY, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Civil Action No. 306-62

ARROW CARRIER CORPORATION, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Opinion

Before: McLAUGHLIN, Circuit Judge, and WORTENDYKE and LANE, District Judges.

By McLAUGHLIN, Circuit Judge.

These are separate suits by unrelated parties brought under 28 U.S.C. § 1336 to set aside orders of the Interstate Commerce Commission. Because they involved similar issues the proceedings before the Interstate Commerce Commission were heard on a consolidated record, with the Examiner filing a single report and recommended order regarding them. They were considered by Division One of the Interstate Commerce Commission which filed a con-

solidated report thereon. Thereafter the Commission reviewed the proceedings and disposed of them in one report and order. The cases were consolidated for hearing in this court and heard March 8, 1963.

The causes came to the Interstate Commerce Commission (I.C.C.) first, through the filing of petitions by both present plaintiffs asking for declaratory orders that they are authorized by the I.C.C., inter alia, to conduct operations between Pennsylvania origin points and Pennsylvania destination points over their certificated interstate routes traversing New Jersey and second, through complaints filed by the Pennsylvania Public Utility Commission (P.U.C.) charging that the plaintiffs are motor carriers holding certain authorities issued by the I.C.C. and subject to the provisions of the I.C.C. Act; that they have transported property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the I.C.C. as required by Sections 203(c) and 206(a)(1) of the I.C.C. Act or having obtained a certificate from P.U.C. as required by Sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania.

Following the hearing before the Examiner the latter filed his recommended report and order. In that he found that the challenged operations of the present plaintiffs between points in Pennsylvania through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania were not authorized by their certificates, that they were engaged in that traffic without proper authority and in violation of the I.C.C. Act, § 206(a)(1) and that an order should be entered requiring each defendant to cease and desist from all such operations. It was also recommended that present plaintiffs' petition above mentioned be denied.

Division One after reconsideration of the issues concluded that the disputed operations of Hudson and Arrow were, but for their routing, actually intrastate commerce and holding that the carriers' petition to the extent they sought an interpretation to the contrary, should be denied. There was the further holding that said operations were authorized by the carriers' certificates and that the complaints in so far as they embraced those activities be dismissed. The Division went on to say:

> "No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in intrastate traffic purportedly under rights arising from certificates issued by this Commission. All things considered, we are convinced that both Hudson and Arrow have, in their respective operations hereinabove described, by which they have transported freight moving between Pennsylvania points without a prior or subsequent interstate movement, attempted in bad faith to convert, to interstate traffic, traffic which, but for routing, is actually in intrastate commerce subject to the laws of Pennsylvania.
>
> "We do not believe, however, than an order directed against such intrastate transportation would be appropriate in these proceedings, inasmuch as we have no jurisdiction over intrastate commerce and the physical operations involved, as actually conducted, violate no provision of the Interstate Commerce Act."

Though the Division concluded, as stated in the paragraph just above, that an order directed against the particular type of transportation would not be appropriate in the proceedings and so to that extent should be dismissed, it did specifically find that:

> "(2) that the challenged operations by defendants between the points in Pennsylvania involved, through

points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania; * * *."

On reconsideration, the Commission stated in its report:

"We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple."

and held:

"On reconsideration in Nos. MC-C-2671 and MC-C-2696, we find (1) that the described operations by defendants between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points without Pennsylvania are authorized by the respective defendants' certificates; and (2) that the described operations by defendants between the involved points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by their respective certificates; and (3) that an order should be entered requiring each defendant to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character.

"In Nos. MC-113933, Mc-71536, and MC-71536, subnumbers 1, 2 and 3, we find on reconsideration that

the matters to which the petitions are directed have been disposed of in the findings above and the petitions thus should be denied.

"An appropriate order will be entered."

The facts are uncomplicated and quite similar in both cases.

Hudson has an I.C.C. certificate which allows it to operate between Philadelphia and Warren County, New Jersey. It has another certificate which permits it to operate between that New Jersey area and Easton, Allentown, Scranton, and the Stroudsburg area. By tacking the two together it has been operating a freight route between Philadelphia and Easton, Allentown, Scranton and other Pennsylvania points in that latter section. Hudson does not have Pennsylvania Public Utility Commission authority for a freight route between Philadelphia and the stated Pennsylvania territory. It is argued most capably on behalf of Hudson that since it has the lawful I.C.C. certificates and since the practice of tacking is permitted, that it should be allowed to continue to so function.

Substantial evidence was presented at the hearing from which either by admission, directly or by proper inference, it could have been justifiably concluded that Hudson's routes between Philadelphia and Easton, Allentown, Scranton and other related Pennsylvania destinations were circuitous, that no stops were made between those points to pick up or deliver freight, that the mileage and time so consumed were both far greater than the distance and time to make such run by directly proceeding between Philadelphia and those places. There is some attempt at fringe contradiction of this but our own examination of the record satisfies us that at best this is quibbling; it actually ignores the supporting testimony and stresses that which is more favorable to Hudson. The Hudson Vice President in charge of traffic and sales was a witness. On

direct examination he testified that his company's route above mentioned between Philadelphia and Scranton was the most direct route. He said the route was through New Jersey. He said that using "these routes" is not subterfuge "because this is the only way Hudson Transportation can travel, via these routes because of our interstate authority, in MC113993". With reference to those routes he said: "We generally operate around the clock, 24 hours a day, seven days a week." He admitted his company advertised in the Philadelphia Telephone Directory. "Direct service to points in Pennsylvania;" that it advertises in the Allentown, Scranton and Wilkes-Barre telephone directories "service in Pennsylvania," that it uses four full time solicitors for business who carry with them a point list of the points Hudson can serve or that it alleges it can service in Pennsylvania.

The witness was asked by the Examiner:

> "If there was no regulation from the I.C.C. or Pennsylvania Public Utility Commission, what route would you take from Philadelphia to Scranton, *the shortest route, a practical route*?"

The witness answered:

> "*In all probability I would take the turnpike*" which he said was in Pennsylvania. (Emphasis supplied).

With respect to the route Hudson takes between Philadelphia and Scranton, the witness was asked:

> "Because you have the authority to go as you allege by way of New Jersey, that is the reason you take it that way?"
>
> The answer was "Yes."
>
> Asked, "So the only difference between what becomes interstate and intrastate is your determination to take it by way of New Jersey?" The witness answered, "It is not my determination. It is the only way we can get to Philadelphia via the gateway of Warren County."

The witness agreed with the testimony of Hudson's Executive Vice President before the Pennsylvania Public Utilities Commission that there were no stops in all Hudson's transportation between Allentown and Scranton and Philadelphia, including no stops made in New Jersey, also that there were no drop-offs in New Jersey, en route, or any pickups en route, in any of the instances involved in the complaints and that the transportation was performed at night, which the witness stated was the normal trucking company time for operation between terminals.

The evidence in the Arrow record is along the same lines. And in this instance also, the carrier position is presented with the utmost of lawyerlike skill. Some objection is raised in Arrow's complaint re dissimilarity of issues with the Hudson matter but before the Examiner when the cases were consolidated, Arrow agreed that "The issues are the same, and therefore I see no reason for a continuance, or for a separation of the issues." The record shows plainly that evidence common to both suits was available for use in the two suits.

Here again we have important testimony from a company executive, this time from the President of Arrow. He stated that all Arrow Philadelphia traffic, destined for Allentown and related Pennsylvania areas, proceeded in a course from Philadelphia to Trenton, New Jersey, Clinton, New Jersey, Phillipsburg, New Jersey, back across the Delaware River and on the Pennsylvania side to Allentown. There are an average of three to four loads a night over these routes in each direction. Covering the same ground he said, "Between Philadelphia and Pennsylvania points, we move three or four loads a night northbound and I would say two or three a night southbound. So you would have an average of six to seven loads a night, I would say, out of a total on your entire system, let us say of around 90 loads." The business has increased to those figures from a trailer load a day between Philadelphia

and other points in Pennsylvania in 1959. From the President's evidence it was fairly inferable that Arrow trailers carry a full load of goods for either its Philadelphia or Allentown terminal with no New Jersey stops to pick up or deliver goods.

Proofs applicable completely warranted the conclusion in this instance, as with Hudson, that Arrow's route was almost double Pennsylvania intrastate route mileage for the distance and for time of run.

Finally, as to the reason for this type of routing the President was asked the following questions and answered as appears:

> "Q. In view of the fact that in each of these instances your New Jersey route is longer and involves more driving time, why do you go that way? Why don't you go the short route directly through Pennsylvania?
>
> A. It is the only authority that we have, granted from the ICC."
>
> "N.T. 215.
>
> Exam. Hanback: Let us assume you had freight moving from Philadelphia to Easton and Scranton only and there were no regulations.
>
> Q. (By Mr. Graf) And no regulations.
>
> A. If there was no regulation, I guess you would take whatever you figured to be the—whether it was the shortest route or the one with the lowest traffic, you would take the most convenient route if there was no regulation.
>
> Q. Let us take another specific example, Philadelphia and Scranton, which way would you go?
>
> A. I would probably go over the [Pennsylvania] turnpike."

Enough has been presented of the evidence to reveal the virtually undisputed pertinent situation of Hudson and

Arrow. Neither one of them possesses, nor it would seem can they obtain, Pennsylvania intrastate certificates for routes between Philadelphia and Allentown, Scranton and adjacent Pennsylvania municipalities. Each of them therefore took two of their I.C.C. interstate certificates and tacked them together. By virtue of this move, they both claim they now have the right to carry Pennsylvania intrastate freight under their tacked interstate certificates by way of New Jersey. This is not a physically surreptitious action. The carriers are not really seeking to hide this from view. What they maintain is that the certificates are genuine and that the practice of tacking them, with the result before us, is valid. That result is engaging in important Pennsylvania intrastate traffic under the aegis of their tacked I.C.C. certificates and so stultifying that state's control of its own intrastate, its local Pennsylvania motor carrier business.

The procedure followed by the Pennsylvania Public Utility Commission in bringing these situations to the Interstate Commerce Commission is entirely proper. The Supreme Court in Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959) has told us that the interpretation of the kind of problem before us is, in the first instance, for the Interstate Commerce Commission under § 204(c) of the Interstate Commerce Act, 49 U.S.C. § 304(c). And see Jones Motor Co. v. Pennsylvania Utility Commission, 361 U.S. 11, Pet. recon. and clar. den. 361 U.S. 904 (1959).

What the P.U.C. claimed to the Interstate Commerce Commission by its complaint was that in their actions outlined heretofore, Hudson and Arrow had abused their interstate certificates. In effect it alleged that the protested interstate routes of the truckers were nothing more than ingenious schemes to evade Commonwealth of Pennsylvania regulations of the intrastate motor carrier business concerned by running the vehicles under the tacked

interstate certificates. In Service, see p. 176, there was uncontracted evidence that the trucker's operations "* * * is not only practical, efficient and profitable, but also that the creation of this 'flow of traffic' is a timesaver to the shipper since there is less time lost waiting for the making up of a full truck load. It also claims a unique service for less-than-truckload shipments of central Virginians who ship commodities to southwest Virginia and Kentucky and who otherwise would suffer long delays on deliveries or would be obliged to ship by special truck at higher rates. While these considerations are not controlling, they throw light on petitioner's claim of bona fides." Against this was proof by Virginia, p. 175, "* * * that petitioner's routes were circuitous and often long, sometimes exceeding twice the shortest possible route. However, it offered no direct evidence of bad faith on the part of petitioner in moving its traffic through Bluefield, West Virginia."

The Supreme Court made no attempt to decide the question of bad faith in Service because it was of the opinion and so held, p. 177: "It appears clear that interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." The case was therefore reversed with the suggestion to the Commonwealth of Virginia that (p. 179): "If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a 'complaint in writing to the Commission by any * * * State Board * * * [that] any * * * carrier * * *' has abused its certificate." Generally regarding "bona fide operation" see McDonald v. Thompson, 305 U.S. 263, 266 (1938); Eichholz v. Public Service Commission of Missouri, 306 U.S. 268, 274, Pet. for rehrg den. 306 U.S. 622 (1939).

In these actions Pennsylvania has followed the course charted by the Supreme Court. The latter in Service noted the finding of the Interstate Commerce Commission in its own Service declaratory opinion, 71 M.C.C. 304. The Commission there acted on the carrier's petition for a declaratory order interpreting its certificate. The Virginia Commission did not participate in that proceeding. The I.C.C. construed petitioner's certificate as authorizing Virginia to Virginia traffic routed through Bluefield, West Virginia. As to this, it states, as quoted in Service, Note 4, p. 178: "In the absence of any showing that petitioner's use of its authorized route is a subterfuge to avoid State regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce." There was no occasion under the circumstances for the Supreme Court to pass upon that rule in its Service opinion. It is, however, squarely before us now and is in our judgment a sound, fair test for evaluating the operations of the carriers with which we are concerned.

From all of the evidence in these two suits the unavoidable conclusion is that the Hudson and Arrow routes involved are not logical and normal operations through their headquarters; that the use by Hudson and Arrow of their tacked on routes is a deliberate, calculated method employed by those carriers to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth. Said evidence overwhelmingly points to those tacked on routes as artificial, contrived arrangements adopted by Hudson and Arrow in order to obtain desirable Pennsylvania intrastate business which would be otherwise unavailable to them. The record makes it very clear that we are here dealing not with bona fide transportation in interstate commerce but with a

mystic maze route which is a more or less shrewd expedient designed solely to escape the control of the Pennsylvania Commission. In the full sense of the word, the operations are subterfuges.[1]

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[1] In accordance with the instruction of the Supreme Court in Service, supra, the Pennsylvania Public Utility Commission filed a complaint against Jones Motor Co., Inc. before the Interstate Commerce Commission. After hearing, the Commission Examiner, following the Service decision, found that the longer, circuitous routes utilized by Jones in and of themselves were not proof of bad faith or subterfuge. The Commission adopted the Examiner's statement of facts but concluded that the Jones transportation constituted a subterfuge. The Jones company filed a complaint in the United States District Court for the Eastern District of Pennsylvania seeking reversal of the Commission's decision. That case was heard in due course and has just been decided (June 4, 1963). The majority opinion held that the Commission's Order is not supported by substantial evidence, that the evidence proved the interstate character of 108 shipments which were comingled with the 22 challenged intrastate shipments; that less than five per cent of plaintiff's business concerns such challenged transportation; that aside from testimony that Jones' routes were circuitous and somewhat long, no direct evidence of bad faith on the part of Jones was offered. The Court then concluded that "*Since the Commission, in its Order, bottomed its finding of bad faith solely upon the circuity of routing by Jones after agreeing with the Examiner in most respects, we must reject this unwarranted conclusion and adopt the Examiner's 'Corrected Report and Recommended Order'.*" (Emphasis supplied)

The Jones facts as presented in the majority opinion, are practically those noted in Service. The situation in Hudson and Arrow is radically different. In both these disputes, the Commission has justifiably found that the all important element of subterfuge in endeavoring to escape the impact of Pennsylvania supervision is the entire motivation of the routing via New Jersey. Also in Jones the Examiner found that, with regard to the circuitous routing, "It is not illogical, but in fact is more practical and feasible from the standpoint of operating efficiency and economy, for a carrier to include in the same vehicles with 108 shipments, which are admittedly in interstate commerce and moving over routes specified in its interstate certificates, 22 other shipments, over a period of four specified days, which, if defendant

It is strongly evident from the whole of the evidence that plaintiffs have absued their disputed certificates and that the Interstate Commerce Commission was justified in so finding and in issuing its cease and desist orders. This was appropriate action in accordance with the opinion of the Supreme Court in Service, supra, and with the mandate of the National Transportation Act "to cooperate with the several States and the duly authorized officials thereof". 49 U.S.C. Preamble to the Interstate Commerce Act.

The complaints will be dismissed.

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had held the appropriate authority, might technically have been moved by themselves over a shorter route." Under the particular facts, the Examiner said that it was not likely the carrier would have used a shorter route even if such had been available. He himself recognized the vital difference between the Jones facts and those in Hudson and Arrow. He stated:

> *"In the Hudson case division 1 found subterfuge because there was no logical reason for the circuitous routing via another State other than that the defendants therein were without appropriate intrastate authority, and in fact defendants therein admitted that, in the absence of any regulation of the challenged transportation, more direct routes would have been employed. Assuming that the division's findings in the Hudson case are not reversed after consideration of the pending petitions for reconsideration, the decision in that case does not form a basis for a holding of subterfuge in the instant proceeding."* (Emphasis supplied).

As we have seen, the referred to findings of Division 1 in Hudson and Arrow were affirmed by the Commission.

From all of the above it is apparent that on substantially different facts found by the Interstate Commerce Commission Examiner, accepted by the Commission and relied upon by the District Court, the routing in the Jones litigation was upheld. The issue before us as we have above detailed is not the one found by the Court to exist in Jones and there decided. Actually the Jones decision in effect strongly supports the rightness of our conclusion in these cases on their own particular facts.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 362-62

HUDSON TRANSPORTATION COMPANY, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Civil Action 306-62

ARROW CARRIER CORPORATION, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

The facts are virtually undisputed. The findings as to these are as set out in the opinion and therefore will not be separately enumerated.

CONCLUSIONS OF LAW

1. Under the particular acts, plaintiffs by their challenged operations, misuse the Interstate Commerce Commission certificates involved in order to obtain the protection granted by them for bona fide interstate use, for transportation of property which originates and terminates in Pennsylvania and in that way avoid the rightful jurisdiction of the Commonwealth of Pennsylvania over said transportation.

2. There is overwhelming evidence on the whole cases to support the findings of the Interstate Commerce Commission and its cease and desist orders in these proceedings.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 362-62

HUDSON TRANSPORTATION COMPANY, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Civil Action 306-62

ARROW CARRIER CORPORATION, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*.

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant.

Order

In accordance with the opinion of the court in these matters filed today, together with the findings of fact as stated and conclusions of law also filed today, the complaints in both these actions are dismissed, with costs.

/s/ GERALD MCLAUGHLIN
Circuit Judge

/s/ REYNIER J. WORTENDYKE, JR.
District Judge

/s/ ARTHUR J. LANE
District Judge

Dated: June 14, 1963.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 306-62

ARROW CARRIER CORPORATION, *Plaintiff*

v.

THE UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Defendants*

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Intervening Defendant

Defendants' Costs

Docket Fee $20.00

Defendant's costs taxed as Twenty Dollars.

MICHAEL KELLER, JR., *Clerk*

By

VERA A. ALEXANDER,
Deputy Clerk

Dated: Newark, N.J.
June 18, 1963

APPENDIX D

INTERSTATE COMMERCE COMMISSION

Service Date March 27, 1962

No. MC-C-2671[1]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

HUDSON TRANSPORTATION COMPANY

Decided March 19, 1962

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1. On reconsideration, findings in prior report, 83 M.C.C. 729, that the defendants in Nos. MC-C-2671 and MC-C-2696 engaged in the transportation of freight between points in Pennsylvania, through points in New Jersey, as a subterfuge to evade the laws of Pennsylvania, *affirmed*. However, such transportation, although ostensibly authorized by defendants' certificate, found to violate the Interstate Commerce Act. Cease and desist order entered.

2. In Nos. MC-113933, MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3) petitions requesting an interpretation of defendants' outstanding certificates denied in view of the interpretation thereof made in the complaint proceedings.

Appearances as shown in the prior report, and, in addition, *Joseph I. Lewis* for complainant and *Carl Helmetag, Jr.*, for intervenor in support of complainant.

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[1] This report also embraces No. MC-C-2696, Pennsylvania Public Utility Commission v. Arrow Carrier Corporation; No. MC-113933, Hudson Transportation Company—Petition for Declaratory Order; and Nos. MC-71536 and MC-71536 (Sub-Nos. 1, 2 and 3), Arrow Carrier Corporation—Petition for Declaratory Order.

REPORT OF THE COMMISSION ON RECONSIDERATION

WEBB, *Commissioner:*

These proceedings involve related issues and were disposed of by division 1 in a consolidated report decided November 30, 1960, hereafter referred to as the prior report. 83 M.C.C. 729.

In No. MC-C-2671, by complaint filed August 24, 1959, and in No. MC-C-2696, by complaint filed October 8, 1959, the Pennsylvania Public Utility Commission, hereafter called P.U.C., alleges that Hudson Transportation Company and Arrow Carrier Corporation, respectively, (1) are motor carriers holding certain authorities issued by the Interstate Commerce Commission, and, as such, are subject to provisions of the Interstate Commerce Act, and (2) have transported property by motor vehicle between certain points in the Commonwealth of Pennsylvania, over routes through points in the State of New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the Interstate Commerce Commission as required by sections 203(c) and 206(1) of the Interstate Commerce Act, or having obtained a certificate from P.U.C., as required by sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania. Complainant prays that the Commission issue an order requiring each defendant to cease and desist from the alleged violations.[2] Answers to the complaints were filed by defendants in the respective proceedings.

---

[2] Motor Freight Express was permitted to intervene in support of complainant in No. MC-C-2696 and in opposition to both petitions. Highway Express Lines, Inc., Rodgers Motor Lines, Inc., Fowler and Williams, Inc., and Modern Transfer Co., Inc., were permitted to intervene in support of both complaints and in opposition to both petitions. By order of January 5, 1961, the Pennsylvania Railroad Company was permitted to intervene.

By petitions filed October 23, 1958, in No. MC-113933, and August 31, 1959, in Nos. MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3), Hudson and Arrow, respectively, request orders interpreting their outstanding certificates, or, in the alternative, they request that the Commission enter declaratory orders finding as to each petitioner (1) that its certificates do not limit it to the transportation of shipments moving between points in Pennsylvania, on the one hand, and, on the other, points in other specified States, and (2) that under its certificates it may conduct interstate operations between points in Pennsylvania through a New Jersey gateway pursuant to the authority described in its certificates and may interchange or interline shipments moving from or to points in Pennsylvania beyond the territorial scope of its authorities with connecting interstate carriers, so long as it actually moves such traffic through New Jersey.[3]

In his recommended report and order, the examiner found in No. MC-C-2671 and No. MC-C-2696, (1) that the described operations by defendants between Philadelphia, Pa., and points in Pennsylvania via points in New Jersey in the transportation of property which originates at a point in Pennsylvania and terminates at a point outside the State, and vice versa, are bona fide operations in interstate or foreign commerce, and are authorized by the defendants' certificates, No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2, and 3); (2) that defendants' transportation of property which originates at Philadelphia, Pa., and terminates at other points in Pennsylvania, and vice versa, is not authorized by their certificates;

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[3] Arrow and Hudson were permitted to intervene in support of each other's petition. P.U.C. was permitted to intervene in opposition to both petitions. The W. J. Dillner Transfer Company was permitted to intervene as its interest may appear. Dillner subsequently adopted by letter the position taken in the separate exceptions of Arrow and Hudson.

(3) that defendants have engaged in the transportation of the traffic described in (2) above without proper authority and in violation of section 206(a)(1) of the Act, and (4) that an order should be entered requiring each defendant to cease and desist from all operations of the character found in his report to be unlawful. The matters to which the petitions in No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2 and 3) are directed were found to have been disposed of in the recommended findings summarized above. Accordingly, the examiner recommended that the petitions be denied.

In the prior report division 1 found in Nos. MC-113933, MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3) that the considered operations by petitioners between the Pennsylvania points involved through points in New Jersey in the transportation of property both originating and terminating at points within Pennsylvania, were, but for their routing, actually in intrastate commerce; and that the petitions in these proceedings, to the extent that they seek an interpretation or order to the contrary, should be denied. In Nos. MC-C-2671 and MC-C-2696, division 1 found that the challenged operations by the respective defendants between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points outside of Pennsylvania are authorized by their certificates; and that these complaints, to the extent that they embrace such activities, should be dismissed. The challenged operations by defendants between the points in Pennsylvania involved, through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania were found to be, but for their routing, in intrastate commerce inasmuch as they were conducted as subterfuge to evade the laws of Pennsylvania. Defendants were not, however, found to be in violation of the Interstate Commerce Act. The complaints were dismissed to the extent they embraced such activity.

Upon consideration of petitions filed by complainant,[4] by Arrow and by Hudson, and replies to the defendants' petitions filed by complainant and supporting intervenors, we reopened the proceedings for reconsideration on the present record. On petition complainant and supporting intervenors seek a cease and desist order, as recommended by the examiner. Arrow and Hudson, respectively, contend that the complaints should be dismissed on their merits and that their petitions for declaratory orders should be granted. We have reviewed the record in the light of these petitions and replies.

The mutual facts involved in these proceedings are not seriously controverted. Since the pertinent facts are set forth in considerable detail in the prior report and in even greater detail in the examiner's report, they will be restated here only to the extent necessary for clarity of discussion. We believe that the factual situation can best be explained by setting forth one movement which is representative of the challenged operations.

Hudson and Arrow solicit freight originating at Philadelphia and destined to Allentown, Pa. They provide a regular service between those two points. Neither holds appropriate intrastate authority, but both are authorized on the face of their interstate certificates to provide the service by routing the involved traffic through New Jersey. The normal route between Philadelphia and Allentown is via U. S. Highway 309, a distance of 52 miles, requiring one hour and 50 minutes of driving time. The distance via Hudson's and Arrow's circuitous interstate routes is over 100 miles requiring three and one-half hours driving time. No stops are made to pick up or deliver freight in

[4] Complainant is again supported by the parties listed in footnote 2 except Motor Freight Express. Highway Express, Rodgers, Fowler and Williams and Modern Transfer filed a joint petition; Pennsylvania Railroad filed a separate one.

New Jersey. No economic justification for the circuitous routing of traffic was shown by either defendant.

We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commence and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple.

With respect to all matters raised on petition, other than the matter of issuing a cease and desist order, we agree with the conclusions and findings in the prior report. The discussion which follows will be limited to the single issue upon which our conclusion differs from that of the prior report.

In the prior report, division 1 declined to issue a cease and desist order for the following reason:

> "We do not believe, however, that an order directed against such intrastate transportation would be appropriate in these proceedings inasmuch as we have no jurisdiction over intrastate commerce, and the physical operations involved, as actually conducted, violate no provision of the Interstate Commerce Act."

It is true, of course, that this Commission has no jurisdiction over intrastate commerce. We do not agree with the conclusion in the prior report that the challenged operations, as actually conducted, violate no provision of the Interstate Commerce Act. That conclusion appears to us to be contrary to the decision of the Supreme Court in *Service Storage & Transfer Co.* v. *Virginia*, 359 U.S. 171 (1959).

The *Service* case involved a carrier which had been transporting freight between certain Virginia points through Bluefield, W. Va., by tacking at the latter point authority issued by this Commission. The carrier held no authority from Virginia. In reviewing the decision of the Supreme Court of Appeals of Virginia finding the carrier guilty of unauthorized intrastate operations, the Supreme Court noted that the transportation was authorized on the face of its interstate certificate. The Court then concluded, *supra*, at 177, that "interpretations of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom the Congress has placed the responsibility of action." In reaching this conclusion, the Court was motivated by a desire to prevent any conflict between Commission and State interpretations of a certificate issued by the Commission.

In response to Virginia's contention in the *Service* case that it must have power to prevent subterfuge operations conducted under the color of authority granted by an I. C. C. certificate, the Supreme Court pointed out, *supra*, at 179:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), . . . authorizes the filing of a 'complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . .' has abused its certificate. See also *Castle* v. *Hayes Freight Lines*, *supra*."

This is the nub of the Court's decision in the *Service* case. If subterfuge operations of the character alleged to have been conducted in the *Service* case, and found in the prior report to have been conducted in the instant proceedings, did not violate the Interstate Commerce Act, the Commission would have no jurisdiction to entertain a com-

plaint filed under section 204(c). Section 204(c) of the Act reads in pertinent part as follows:

> "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith * * *".

Section 204(c) expressly authorized the Commission to investigate alleged violations of the Interstate Commerce Act and to issue appropriate orders to compel compliance. Obviously, the Supreme Court in the *Service* case did not suggest to the Commonwealth of Virginia a remedy that was in fact not available. In effect, the Supreme Court in the *Service* case interpreted section 204(c) as follows:

> (c) "Upon complaint in writing to the Commission by any . . . State board . . ., the Commission may investigate whether any motor carrier . . . has committed a subterfuge of any state's regulatory jurisdiction. If the Commission, after notice and hearing, finds upon such investigation that the motor carrier has committed such a subterfuge, the Commission shall issue an appropriate order to compel the carrier to cease . . ."

Although the *Service* case was one of first impression with respect to subterfuge operations under the Act, the basic principle had been established in *Castle* v. *Hayes Freight Lines*, 348 U. S. 61 (1954). There, the Supreme Court, in holding that Illinois had no power to bar interstate motor carriers from using its highways, pointed out, *supra* at 65:

> "If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no

> reason why the Commission may not protect the state's interest, either on the Commission's own initiative or on complaint of the state."

Although subterfuge operations, unlike the operations involved in the *Castle* case, are not specifically condemned by any regulation of the Commission, cooperation between the Federal government and the several States is woven by necessary implication into the fabric of the Motor Carrier Act and is expressly required by the national transportation policy. We believe that the requirement of Federal-State cooperation in motor carrier regulation is sufficiently definite and essential to support a complaint filed on behalf of a State under section 204(c) of the Act and the issuance of an appropriate compliance order.

We do not mean to suggest, however, that the Commonwealth of Pennsylvania is unable, by virtue of our findings in these proceedings, to enforce its own laws and regulations with respect to the challenged operations of the defendants. We have found, in effect, that those operations are intrastate in character even though, physically, they traverse State boundary lines. Accordingly, within certain limits, those operations are subject to State regulation. Cf. *Eichholz* v. *Public Service Commission*, 306 U. S. 268 (1939). Our order in these proceedings merely enjoins the defendants from using their interstate certificates to evade or subvert lawful regulation by the Commonwealth of Pennsylvania. We do not know whether or to what extent enforcement action under the laws of Pennsylvania would be ineffective or unduly time-consuming. That is a matter that need not be explored since the Interstate Commerce Act clearly contemplates, under the circumstances here disclosed, that the Federal power be made available to supplement that of the States.

On reconsideration in Nos. MC-C-2671 and MC-C-2696, we find (1) that the described operations by defendants between points in Pennsylvania through points in New

Jersey in the transportation of property originating or terminating at points without Pennsylvania are authorized by the respective defendants' certificates; and (2) that the described operations by defendants between the involved points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by their respective certificates; and (3) that an order should be entered requiring each defendant to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character.

In Nos. MC-113933, MC-71536 and MC-71536 (Sub-Nos. 1, 2 and 3), we find on reconsideration that the matters to which the petitions are directed have been disposed of in the findings above and the petitions thus should be denied.

An appropriate order will be entered.

Commissioner Herring, dissenting:

I am unable to agree with the views of the majority as I believe an erroneous interpretation is being placed on the Supreme Court's decision in the *Service* case, 359 U. S. 175. Although I voted for the earlier report while a member of Division 1, on further reflection I believe the discussion therein went too far and should be modified.

Transportation between points in a State through another State is interstate commerce in the most literal sense. Congress might have given to the States authority to regulate such motor transportation, but it elected to occupy this field and gave to the Commission authority to regulate such transportation. Section 203(a)(10) of the Act defines the interstate commerce over which the Commission is given jurisdiction to include commerce "between

places in the same State through another State". This means that this Commission should regulate such transportation in accordance with the Interstate Commerce Act and not prohibit it in deference to the States or motor carriers operating in competition therewith under intrastate authority issued by the States.

Division 1 concluded, and I think correctly, that the certificates issued by the Commission authorize this transportation between points in Pennsylvania through New Jersey. These certificates may be revoked, in whole or in part, only in accordance with the procedure of section 212(a), and only for willful violation of the Interstate Commerce Act or regulations prescribed thereunder. There is no showing here of any such violation.

It is conceivable, although very doubtful, that the Commission under section 208(a) may prohibit transportation such as that involved here by attaching to the exercise of the privilege granted by the certificates, terms, conditions, or limitations found to be required by public convenience and necessity. This proceeding seems, however, not to be directed to those issues and it is not clear to me what evidence, in accordance with the provisions of the Interstate Commerce Act, would support such an action. If the carriers are not charging reasonable rates for the service rendered, the remedy would be to require the rates to be increased. Some shippers may prefer to use such interstate service in lieu of intrastate service, even at the same or higher rates. I see no point in attempting to prohibit them from doing so, particularly when it would involve the application of a vague and uncertain doctrine which would make the meaning of certificates uncertain and which may involve the Commission in interminable arguments as to when a carrier may or may not perform such transportation.

I know of no constitutional or statutory doctrine which requires interstate commerce to defer to intrastate com-

merce. This is particularly true here where the Congress has expressly occupied the field and applied Federal regulation, as pointed out in the definition of interstate commerce in section 203(a)(10). I know of no law or policy which gives to intrastate carriers a right to be free of interstate competition. If there is anything wrong with the interstate carriers' operations, such as their rates, the State or the intrastate carriers have a remedy under the Interstate Commerce Act. What is proposed here is to apply a doctrine of supremacy of State law; a section 13 doctrine in reverse. I find nothing in the Act to support such a proposal.

Prior to the Motor Carrier Act, States exercise a limited jurisdiction over interstate carriers, particularly interstate carriers transporting between points in a State through another State. The *Eichholz* case, 306 U.S. 268, is an example. In the *Service* decision, supra, at 179, the Supreme Court laid this doctrine to rest by pointing out:

> There Missouri revoked a carrier's interstate permit because it crossed state lines into Kansas City, Kansas, for the sole purpose of *creating* an interstate operation. Eichholz, however, had no certificate from the Interstate Commerce Commission, and this court's opinion was premised on this fact rather than that the interstate operations were merely a subterfuge and hence not bona fide.

The use of such terms as "not bona fide", "subterfuge", etc., arose prior to the Motor Carrier Act in the efforts of the State to regulate, to the extent they were permitted, interstate motor carrier operations. The term "bona fide" also was used in the original grandfather clauses as a test as to whether a certificate or permit should be issued to carriers then in operation. Upon the occupation of the interstate field by the Federal Government and the conclusion of the grandfather clause applications, these terms should have passed from the Commission's vocabulary. I do not think it is fitting for the Commission to char-

acterize as "not bona fide" or as a "subterfuge" interstate operations which it has authorized a carrier to perform.

It is true that in the *Service* case, the Court did not go out of its way to criticize the Commission's use in its *Service* declaratory report, 71 M. C. C. 304, and in *Atlantic Frt. Lines, Inc.*, 51 M. C. C. 175, of statements that the operations were not subterfuges and that they were bona fide. There was no occasion to do so since the conclusions were correct, regardless of these comments. From the *Service* decision, however, it is my view that the Court regarded the crucial test to be whether the interstate certificate, as interpreted by the Commission, authorized the transportation. This is indicated by such statements as the following:

> The certificate on its face covers the whole operation. (p. 177)
>
> > It appears clear that *interpretations* of federal certificates of this character should be made in the first instance by the authority issuing the certificate and upon whom Congress has placed the responsibility of action. (p. 177. Emphasis added.)
> >
> > After the Virginia Commission had found petitioner to be operating in intrastate commerce and fined it for such operation, the I. C. C. issued an opinion, 71 M. C. C. 304, in which it *construed* petitioner's certificate as *authorizing* Virginia-to-Virginia traffic routed through Bluefield, West Virginia. This was but a reaffirmation of its prior *interpretation* of the certificate. 59 M. C. C. 803, supra. Such conflicts can best be avoided if the *interpretation* of I. C. C. certificates is left to the Interstate Commerce Commission. (p. 158. Emphasis added.)

A point has been made by the majority of the words "has abused its certificate" in the following statement of the Court:

> Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide

> interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a "complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . ." has abused its certificate. See also Castle Freight Lines, supra. Thus the possibility of a *multitute of interpretations* of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved. (p. 179. Emphasis added.)

The remedies provided in section 204(c) are for violations of the Interstate Commerce Act and requirements established thereunder. The "abuse of its certificate" must, therefore, refer to a violation of the Act or the terms of the certificate. It seems to be that the "Abuse" of the certificate must mean doing, under claim of authority, something not authorized by the certificate. In the context, I do not know of any other act that would constitute an "abuse" of a certificate. This, however, calls for an "interpretation" of the certificate and nothing more. That this is the meaning intended by the Court, to me, is indicated by the immediately following sentence referring to the avoidance of a multitude of *interpretations* of the certificate.

At the time these certificates were issued or at the time they were transferred. if the issue had been raised and such action were found required by public convenience and necessity or the public interest, the Commission *might* have restricted the certificates to exclude transportation between points in the State through another State. However, this was *not* done and the carrier is entitled to engage in all operations within the language of the certificate and, as indicated above, this grant may be revoked only in accordance with section 212(a) of the Act.

In addition to the above, I am concerned as to how the Commission can reconcile the decision herein with the fact

that in countless cases it has granted authority to a carrier to perform an interstate service between points in a single State by operating over highways in an adjoining State. In those cases, it seems to me, the Commission was encouraging the type of operation which the majority now condemns; cf. No. MC-108449 (Sub-No. 85), *Indianhead Truck Line, Inc., Extension—Marshall, Minn.*

It is my view that, upon finding that the transportation in question is authorized by the outstanding certificates, the Commission should deny the complaint of the Pennsylvania Commission with an explanation of the reasons why no further action may be taken in this proceeding.

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 19th day of March A. D. 1962

No. MC-C-2671

PENNSYLVANIA PUBLIC UTILITY COMMISSION
v.
HUDSON TRANSPORTATION COMPANY

No. MC-C-2696

PENNSYLVANIA PUBLIC UTILITY COMMISSION
v.
ARROW CARRIER CORPORATION

No. MC-113933

HUDSON TRANSPORTATION COMPANY—
PETITION FOR DECLARATORY ORDER

No. MC-71536

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 1)

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 2)

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 3)

ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

It appearing, That on November 30, 1960, the Commission, division 1, made and filed its report and order in

the above entitled proceedings, determining the lawfulness of the involved operations;

It further appearing, That upon consideration of the record and of separate petitions filed by complainant, intervenors in support of complainant, and defendants for reconsideration, and replies to defendants' petitions, by order of September 22, 1961, the proceedings were reopened for reconsideration on the present record;

And it further appearing, That reconsideration of the matters and things involved has been given and that the Commission, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the report and order of November 30, 1960, are hereby referred to and made a part hereof;

It is ordered, That the said order of November 30, 1960, be, and it is hereby, vacated and set aside;

It is further ordered, That defendants in No. MC-C-2671, and No. MC-C-2696 be, and they are hereby, notified and required within 30 days from the date this order becomes effective pursuant to the provisions of Section 17(5) of the Interstate Commerce Act, to cease and desist, and hereafter abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character;

It is further ordered, That the said petitions in Nos. MC-113933, MC-71536, and MC-71536 (Sub-Nos. 1, 2 and 3) be, and they are hereby, denied.

And it is further ordered, That this order shall become effective on May 7, 1962.

By the Commission.

HAROLD D. McCOY
Secretary

(SEAL)

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No. 467

IN THE
Supreme Court of the United States

October Term, 1963

ARROW CARRIER CORPORATION,
Appellant

vs.

UNITED STATES OF AMERICA
and
INTERSTATE COMMERCE COMMISSION,
Appellees

On Appeal from the United States District Court for the District of New Jersey.

MOTION TO AFFIRM
of the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

WILLIAM A. GOICHMAN
Assistant Counsel
JOSEPH C. BRUNO
Chief Counsel
For Pennsylvania Public
Utility Commission

127 North Office Building
Harrisburg, Pennsylvania

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.

TABLE OF CONTENTS

	Page
I. Opinions Below	2
II. Jurisdiction	2
III. Statutes Involved	3
IV. Counter-Statement of Questions Presented:	
1. Is Subterfuge of a State's Jurisdiction by an Interstate Commerce Common Carrier a Violation of the I.C.C. Act Enjoinable by the Interstate Commerce Commission?	4
2. If So, Is There Substantial Evidence To Support a Finding of Subterfuge Made by the Interstate Commerce Commission?	4
V. Statement	5
VI. The Questions Are Insubstantial:	
Argument:	
(I) Subterfuge Is an Issue	9
(II) The Findings of the Interstate Commerce Commission Are Supported by Substantial Evidence:	
1. Scope of Review	18
2. Analysis of the Evidence	18
(III) The I.C.C. Did Not Place the Burden of Proof Upon Plaintiff	24
VII. Conclusion	26
Appendices:	
A—"Report of the Commission" Issued by Division 1	1a
B—Report of Hearing Examinations	36a

TABLE OF CITATIONS

JUDICIAL DECISIONS CITED:

Austin v. Tenn., 179 U.S. 343, at page 361, 21 S. Ct. 132, 139 (45 L. Ed. 224) 13, 14

Castle v. Hayes Freight Lines, 348 U.S. 61, 75 Sup. Ct. 191 (1954) 16

Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 660, 68 S. Ct. 1260, 92 L. Ed. 1633 ..... 11, 12, 27

Eichholz v. P.S.C. of Missouri, 306 U.S. 268, 59 Sup. Ct. 532, 83 L. Ed. 641 ..... 12, 13, 25, 27

Illinois C. R. Co. v. I.C.C., 206 U.S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700 18

Interstate Busses v. Holyoke Ry., 273 U.S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530 (1927) 13

Intercity Coach Company v. Atwood, 21 F. 2d 83 (D.R.I. 1927) 13

Interstate Commerce Commission v. Union Pacific R.R. Co., 222 U.S. 541, 32 S. Ct. 108, 56 L. Ed. 308 (1912) 18

Jones Motor Co. v. Pennsylvania Public Utility Commission, 361 U.S. 11, Pet. Recon. and Clar. Den. 361 U.S. 904 (1959) 10

Kirmeyer v. Kansas, 236 U.S. 568, 35 S. Ct. 419, 59 L. Ed. 721 14

Rathburn v. U. S., 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2nd 134 15

Ryan v. Pennsylvania Public Utility Commission, 143 Pa. Super. 517, 17 A. 2d 637 (certiorari denied), 314 U.S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941), federal injunction denied, 44 F. Supp. 912 (D.C. Pa. 1942); Biggs, C. J., motion to dismiss granted, 317 U.S. 702, 63 S. Ct. 162, 87 L. Ed. 561 (1943) 12

Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia, 359 U.S. 171, at p. 179, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959) 5, 9, 10, 11, 12, 13, 16, 17, 27

Swift & Co. v. U. S., 343 U.S. 373, 72 S. Ct. 716, 96 L. Ed. 1009 (1952) 23

STATUTES CITED:

Pennsylvania Public Utility Law—Purdon's Penna. Statutes Annotated, 66, 1122(b) and 1122(c):

202(b) 5, 6

202(c) 5, 6

Interstate Commerce Act:

§201, 49 U.S.C. §301 ..... 3, 15

§202(b) Part II, I.C.C. (49 U.S.C. 302(b)) 3, 15

§203(c) and §206(1) Part II, I.C.C. Act (49 U.S.C. §303(c)) 5

§204(a)(6) Part II, I.C.C. Act (49 U.S.C. §304(a)(6)) 3, 5, 16

§204(c) Part II, I.C.C. Act (49 U.S.C. §304(c)) 5, 9, 10, 16, 26

§206(1) Part II, I.C.C. Act 5

71 M.C.C. 304 10

28 U.S.C. §§2284 and 2325 5

MISCELLANEOUS:

House Committee Report (H.R. Rep. 1645), 74th Congress V. 79, page 12207 ..... 14, 15

Senate 1629, 74th Congress—M.C.C. Act. of 1935 15

79th Congressional Record 12197 15

In the
Supreme Court of the United States

No. 467 October Term, 1963

ARROW CARRIER CORPORATION

Appellant

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION

Appellees

MOTION TO AFFIRM

of the

PENNSYLVANIA PUBLIC UTILITY COMMISSION

The Pennsylvania Public Utility Commission, Appellee in the above case, and intervening defendant in the Court below, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

I. OPINIONS BELOW

The "Report of the Commission" issued by Division 1 of the Interstate Commerce Commission (consisting of Commissioners Murphy, Goff and Herring) decided November 30, 1960 is printed at 83 M.C.C. 729, and is attached hereto as Appendix A. The "Report and Order Recommended by H. L. Hanback, Hearing Examiner" issued under service date May 16, 1960, is attached hereto as Appendix B. These reports were omitted from the Jurisdictional Statement. Since it appears to us that such reports should have been included under Rule 15, which requires the attachment of "the official and unofficial reports of the opinions delivered in the courts below," we have appended same to our Motion to Affirm.

II. JURISDICTION

We agree that jurisdiction by direct appeal to your Honorable Court is conferred by statute.

III. STATUTES INVOLVED

Section 202(b) of Part II of the Interstate Commerce Act (49 U.S.C. 302(b)):

> "Nothing in this part shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

The National Transportation Policy (see Note preceding Section 201, 49 U.S.C. §301)):

> One of the purposes of the Act is "to cooperate with the several States and the duly authorized officials thereof."

Section 204(a)(6) of Part II of the Interstate Commerce Act (49 U.S.C. 304(a)(6)):

> "It shall be the duty of the Commission—(6) To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; . . ."

These provisions may be added to those set forth by appellant in its Jurisdictional Statement.

IV. COUNTER-STATEMENT OF QUESTIONS PRESENTED

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1. Is subterfuge of a State's jurisdiction by an interstate commerce common carrier a violation of the Interstate Commerce Act enjoinable by the Interstate Commerce Commission?

Answered in the **affirmative** by Court below.

2. If so, is there substantial evidence to support a finding of subterfuge made by the Interstate Commerce Commission?

Answered in the **affirmative** by Court below.

V. STATEMENT

This is a direct appeal from the final judgment and decree entered on June 14, 1963, by a district court of three judges specifically constituted pursuant to 28 U.S.C. §§2284 and 2325, dismissing appellant's complaint which sought to set aside an order issued by the entire Interstate Commerce Commission.

On October 8, 1959, the Pennsylvania Public Utility Commission filed a complaint with the Interstate Commerce Commission under Section 204(c) of Part II of the Interstate Commerce Act, 49 U.S.C. §304(c) in accordance with the procedure prescribed by your Honorable Court in *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, p. 179, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959). The complaint against Arrow Carrier Corporation ("Arrow") was docketed MC-C-2696. It alleged, in substance, that: (1) Arrow is a motor carrier holding certificates of public convenience and necessity issued by the Interstate Commerce Commission, and, as such, is subject to the provisions of the Interstate Commerce Act, and (2) that it has transported property by motor vehicle between certain points and places in the Commonwealth of Pennsylvania through routes and highways in the Commonwealth of Pennsylvania and in the State of New Jersey, using the State of New Jersey as a subterfuge to circumvent the jurisdiction of the Pennsylvania Public Utility Commission and in violation of Sections 203(c) and 206(1), 49 U.S.C. §§303(c) and 206(1) of Part II of the Interstate Commerce Act, and in violation of Sections 202(b) and 202(c) of the Public Utility

Law of Pennsylvania, 66 Purdon's Pennsylvania Statutes Annotated 1122(b) and 1122(c), since Arrow failed to obtain the requisite certificates of public convenience required by the above-cited Acts to authorize the operations in question. The complaint set forth 20 specific instances of transportation, two of which were later shown at hearing (Tr. 330) to have been erroneously included. The remaining 18 shipments originated as follows: seven originated in Philadelphia and were destined for Catasauqua, Muncy, Shamokin, White Haven and three for Scranton, all in Pennsylvania; three originated in Shamokin for Philadelphia; two in Allentown for Philadelphia; two in Scranton for Philadelphia; one in Wilkes-Barre for Philadelphia; one in Bangor for Philadelphia; one in Swoyersville for Philadelphia; and one in Fort Washington for Lock Haven. The complaint prayed for the issuance of a cease and desist order.

A similar complaint had been filed by the Pennsylvania Public Utility Commission on August 24, 1959, against Hudson Transportation Company ("Hudson") docketed at MC-C-2671.

Prior to these complaints, Hudson and Arrow had each petitioned the Interstate Commerce Commission for a declaratory order seeking approval of its operations. These petitions, for all intents and purposes, became moot when the complaints had been filed. The background of these petitions concerns complaints which the P.U.C. had filed before itself against these carriers and these proceedings had progressed to various stages when the carriers filed their petitions for declaratory order. The P.U.C. proceedings were then stayed, pending the outcome of the I.C.C. proceedings.

The following motor carriers holding certificates of public convenience from the P.U.C. and which were affected by the challenged transportation adversely were

allowed to intervene on behalf of the P.U.C.: Highway Express Lines, Inc., Fowler & Williams, Inc., and Motor Freight Express.

The complaints and petitions were referred to an Examiner for hearing and recommendation of an appropriate order thereon. The aforesaid complaints and petitions were heard on a consolidated record at Philadelphia, Pennsylvania, on October 13 and 14 and December 3, 1959. Briefs were filed by all parties and on May 16, 1960, the Honorable H. L. Hanback, Hearing Examiner, used a Recommended Report and Order making the following dispositions: (1) In No. MC-C-2671 and No. MC-C-2696, defendants were found to be performing unauthorized transportation as a motor carrier of certain traffic between specified points in Pennsylvania via points in New Jersey. A cease and desist order was recommended; (2) In No. MC-113933 and No. MC-71536 and MC-71536 (Sub Nos. 1, 2 and 3), all matters to which the petitioners' petitions were directed were found to have been determined in the complaint proceedings. Accordingly, the petitions were denied.

Exceptions were filed by defendants to the Recommended Order, to which complainant and intervenors filed replies. On November 30, 1960, Division 1, consisting of Commissioners Murphy and Herring, Commissioner Goff not participating, issued its Report and Order adopting all the findings of fact made by the Examiner on the question of subterfuge, but finding that the complaints must be dismissed on the ground that the I.C.C. has no jurisdiction to enjoin a subterfuge of complainant's jurisdiction.

Complainant and the intervenors on its behalf filed Petitions for Reconsideration with the entire Interstate Commerce Commission, sitting as an appellate body over Division 1, praying for a cease and desist order as recommended by the Hearing Examiner.

By order dated September 22, 1961, the Interstate Commerce Commission granted the Petitions for Reconsideration and on March 27, 1962, issued its Order, adopting the findings of fact consistently made by Division 1 and the Hearing Examiner and issuing a cease and desist order against Hudson and Arrow ordering them "hereafter [to] abstain from holding themselves out or performing, under certificates issued by this Commission, all operations herein found to be, in effect, intrastate in character". The order was scheduled to become effective on May 7, 1962.

Complaints were subsequently filed by Arrow and Hudson with the United States District Court for the District of New Jersey to set aside the orders of the Interstate Commerce Commission. The effective date of the cease and desist orders of the I.C.C. was stayed by agreement pending determination of the complaints by the District Court. After briefing and argument before the three judge statutory court, consisting of Circuit Judge McLaughlin, Judges Wortendyke and Lane, the Court on June 14, 1963, issued its decision dismissing the complaints and finding that plaintiffs had misused their I.C.C. certificates in order to avoid the "rightful" jurisdiction of the Commonwealth of Pennsylvania over said transportation. The Court further declared that there was "overwhelming" evidence to support the findings of the Interstate Commerce Commission.

Upon request of Arrow Carrier Corporation to stay proceedings pending disposition of its appeal to your Honorable Court, the District Court on September 10, 1963, denied the petition. Notice of Appeal was filed in your Honorable Court on July 15, 1963. The Hudson Transportation Company did not appeal the order of the District Court.

VI.

THE QUESTIONS ARE INSUBSTANTIAL

ARGUMENT

(I) Subterfuge Is an Issue

The law of this case is to be found in *Service Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959), which involved an interstate motor carrier that was transporting 3% of its truckload freight between points in the Commonwealth of Virginia through highways in adjoining West Virginia. On a writ of certiorari your Honorable Court held that the Commonwealth of Virginia could not prosecute the carrier for committing a subterfuge but that jurisdiction in the first instance was vested in Interstate Commerce Commission in order to avoid a multitude of interpretations of federal certificates. Your Honorable Court reversed the decision of the Supreme Court of Virginia finding a subterfuge and **in the words controlling the instant question at bar** said:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a **subterfuge** to escape its jurisdiction, it can avail itself of the **remedy** Congress has provided in the Act. Section 204(c), supra, note 2, authorizes the filing of a 'complaint in writing to the Commission by any * * * State board * * * (that) any * * * carrier * * * ' has abused its certificate. See also Castle v. Hayes Freight Lines, supra.

Thus the possibility of a multitude of interpretations of the same federal certificate by several States will be avoided and a uniform administration of the Act achieved."

That case, as here, involved:

(1) an interstate carrier;

(2) a carrier which was accomplishing its transportation of state freight by means of tacking (see 71 M.C.C. 304 for description of the tacking employed by Service Storage); and

(3) a carrier that was serving between points in Virginia by way of highways in West Virginia.

This Commission followed the procedure set forth by your Honorable Court in the *Service* case and filed its complaints with the Interstate Commerce Commission under Section 204(c), claiming that defendant's operation was not bona fide interstate but merely a subterfuge to escape its jurisdiction.

The District Court approved the procedure undertaken by the P.U.C. in these words (JS 9a):

"The procedure followed by the Pennsylvania Public Utility Commission in bringing these situations to the Interstate Commerce Commission is entirely proper. The Supreme Court in Service Storage & Transfer Co., Inc. v. Virginia, 359 U.S. 171 (1959) has told us that the interpretation of the kind of problem before us is, in the first instance, for the Interstate Commerce Commission under §204(c) of the Interstate Commerce Act, 49 U.S.C. §304(c). And see Jones Motor Co. v. Pennsylvania Public Utility Commission, 361 U.S. 11, Pet. recon. and clar. den. 361 U.S. 904 (1959).

"What the P.U.C. claimed to the Interstate Commerce Commission by its complaint was that in their actions outlined heretofore, Hudson and Arrow had abused their interstate certificates. In effect it alleged that the protested interstate routes of the truckers were nothing more than ingenuous schemes to evade Commonwealth of Pennsylvania regulations of the intrastate motor carrier business concerned by running the vehicles under the tacked interstate certificates."

Appellant in its Jurisdictional Statement, in effect, argues that subterfuge is not an issue because:

(1) It is observing the rules of tacking;

(2) The Interstate Commerce Act defines interstate commerce as transportation between points in the same State through another State;

(3) *Central Greyhound Lines v. Mealey*, 334 U.S. 653, 68 S. Ct. 1260, 92 L. Ed. 1633 (1948), holds that transportation between two points in one State through another State is interstate commerce.

Appellant in such argument overlooks the important and controlling pronouncement made by your Honorable Court in the *Service Storage* case. Certainly, your Honorable Court was fully aware of the doctrine of tacking (the Court quotes the I.C.C. unpublished report on page 177 of 359 U.S.); it was fully aware of the definition of interstate commerce contained in the Interstate Commerce Act; it was fully aware of its tax decision in *Central Greyhound Lines*, nevertheless your Honorable Court outlined the procedure to follow in such cases. As the I.C.C. observed: "Obviously, the Supreme Court in the *Service*

case did not suggest to the Commonwealth of Virginia a remedy that was in fact not available." (JS. 24a)

It is also interesting to note that your Honorable Court in footnote 4 of the *Service* case, adopts that portion of the I.C.C. opinion setting forth its interpretation of the law, as follows:

> "4. In its declaratory opinion the Commission noted: 'In the absence of any showing that petitioner's use of its *authorized* route is a subterfuge to avoid state regulation, or other than a logical and normal operation through the carrier's headquarters, we are of the opinion that petitioner's operations, in the manner described, constitute bona fide transportation in interstate commerce."

This is more than an inconsequential recognition of an irrelevant part of the I.C.C.'s decision. This is recognition of the existence of the question of *subterfuge* as an issue in the case. We may properly assume that your Honorable Court rarely places legal doctrines in its Opinions unless it believes in them. The foregoing language clearly establishes that an I.C.C. certificated carrier can, under a given set of facts, be utilizing its "authorized route" for the purpose of committing a subterfuge. The carrier can be engaging in an operation which is neither "logical" nor "normal".

Even in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660, 68 S. Ct. 1260, 92 L. Ed. 1633, your Honorable Court said:

> "There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, e.g., Eichholz v. Public Service Commission of Missouri, 306 U.S.

268, 59 S. Ct. 532, 83 L. Ed. 641, and Ryan v. Pennsylvania Public Utility Commission, 143 Pa. Super. 517, 17 A. 2d 637." [Certiorari denied, 314 U.S. 640, 62 S. Ct. 80, 86 L. Ed. 514 (1941); federal injunction denied, 44 F. Supp. 912 (D.C. Pa. 1942); Biggs, C. J., motion to dismiss granted, 317 U.S. 702, 63 S. Ct. 162, 87 L. Ed. 561 (1943).]

The doctrine in the *Service Storage* case that subterfuge can be halted by the Interstate Commerce Commission is part of the the decisional law. For example in *Austin v. Tenn.*, 179 U.S. 343, at page 361, the Court said:

> "And yet we are told that each one of these packages is an original package, and entitled to the protection of the Constitution of the United States as a separate and distinct importation. *We can only look upon it as a discreditable subterfuge, to which this Court ought not to lend its countenance.*"

See also *Interstate Busses v. Holyoke Ry.*, 273 U.S. 45, 51, 47 S. Ct. 298, 71 L. Ed. 530 (1927), and *Eickholz v. P.S.C. of Missouri*, 306 U.S. 268, 59 Sup. Ct. 532, 83 L. Ed. 641.

In *Intercity Coach Company v. Atwood*, 21 F. 2d 83 (D.R.I. 1927), appeal dismissed, 278 U.S. 663, 49 S. Ct. 78, 73 L. Ed. 569 (1928), the coach company sought to enjoin certain Rhode Island officials from prosecuting it for failing to obtain a permit for transportation between Providence, R. I., and Woonsocket, R. I., which the bus line was performing by way of Attleboro, Mass. The Rhode Island P.U.C. found that the coach company "was in reality trying to run a bus line between Providence and Woonsocket, both in R. I., and was diverting its route for a few miles through this thinly-settled portion of Massachusetts in order to ground a claim of needing no permit

from the R. I. authorities because engaged in interstate commerce", 21 F. 2d at 84.

The Court went on to say:

> "The question before us, taking the evidence most favorably to the plaintiff, is whether a bus, using the highways for carrying for hire intrastate passengers escapes state highway regulations because it may also carry an occasional interstate passenger. In our opinion it does not. Still less does it do so if (as on the present record is at least probable) the interstate character of the transportation is 'a discreditable subterfuge, to which this court ought not to lend its countenance.' Brown, J., Austin v. Tennessee, 179 U.S. 343, at page 361, 21 S. Ct. 132, 139 (45 L. Ed. 224). In Kirmeyer v. Kansas, 236 U.S. 568, 35 S. Ct. 419, 59 L. Ed. 721, an alleged interstate transaction is referred to by the court as being 'not a bona fide commercial arrangement.' *In our opinion, interstate commerce, in order to be entitled to the protection of the federal Constitution, must be real and bona fide.* The question whether it is so is open to inquiry." (21 F. 2d 85) (Emphasis added.)

Furthermore, we find in a careful review of the Federal Motor Carrier of 1935 (Part II of the Interstate Commerce Act) and its legislative history an underlying purpose to prevent I.C.C. carriers from committing such a subterfuge. For example, Congressman Merritt in discussing the Bill stated on page 12207 of Vol. 79 of the 74th Congress, as follows:

> "But the demands of the State regulatory bodies for Federal control of interstate business by buses and trucks is unanimous. It has been found in some

cases that bus lines and other forms of transportation will nominally start just over the line of one State, but do the major part of their business in adjoining States simply for the purpose of using its interstate character to escape the control and the regulation of the State in which the major part of its business is done. From this point of view alone, a Federal law is not only justified but demanded."

In the House Committee Report (H.R. Rep. 1645—74th Congress to accompany S. 1629, 74th Congress, which became the Motor Carrier Act of 1935), it is stated: "S. 1629 fills the gap in motor carrier regulation as between the States . . ." Representative Harlan expressed the view that the Act "gives the States more rights to control intrastate than they ever had before." 79 Cong. Rec. 12197. Every statute must be interpreted in the light of reason and common understanding to reach results intended by the legislation. *Rathburn v. U. S.*, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2nd 134. The result reached by the District Court represents a result intended to be accomplished by the Federal Motor Carrier Act.

It may also be seen from the National Transportation Policy (see Note preceding Section 201, 49 U.S.C. §301) that one of the purposes of the Motor Carrier Act was to have the federal government "cooperate with the several states and the duly authorized officials thereof." Moreover under §202(b) of Part 2 of the Interstate Commerce Act (49 U.S.C. §302(b)), Congress clearly intended that the integrity of the states in their jurisdictional sphere was to be respected. Congress accordingly provided:

"Nothing in this part shall be construed . . . to authorize a motor carrier to do an intrastate business

> on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intra-state commerce by motor carriers on the highways thereof."

Congress to enable the I.C.C. to effectively administer the provisions of the I.C.C. Act and carry out its purposes gave plenary authority to the Interstate Commerce Commission in Section 204(a)(6) of Part II of the Interstate Commerce Act, 49 U.S.C. 304(a)(6) when it provided:

> "It shall be the duty of the Commission—(6) To administer, execute and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration; . . ."

It was with these facts in mind as well as others that the Interstate Commerce Commission in its order of March 19, 1962, stated as follows:

> "Although subterfuge operations, unlike the operations involved in the *Castle* case, are not specifically condemned by any regulation of the Commission, cooperation between the Federal government and the several States is woven by necessary implication into the fabric of the Motor Carrier Act and is expressly required by the national transportation policy. We believe that the requirement of Federal-State cooperation in motor carrier regulation is sufficiently definite and essential to support a complaint filed on behalf of a State under section 204(c) of the Act and the issuance of an appropriate compliance order."

If the doctrine of subterfuge was nonexistent as appellant claims, your Honorable Court would hardly have cited in the *Service* case its prior decision of *Castle v.*

Hayes Freight Lines, 348 U.S. 61, 75 Sup. Ct. 191 (1954). That case as your Honorable Court may recall involved a motor carrier which continually violated the State Highway Regulations of the State of Illinois while he was engaged in the transportation of goods in interstate commerce under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. The question raised by that case was whether the State of Illinois could bar the carrier from use of the State roads because of repeated violations pertaining to weight. In that case your Honorable Court held that the State could not bar a carrier, but in such cases the Interstate Commerce Commission could. Your Honorable Court said, 348 U.S. at page 65:

> "If, therefore, motor carriers persistently and repeatedly violate the laws of a state, we know of no reason why the Commission may not protect the state's interest either on the Commission's own initiative or on complaint of the state."

The citation of this case by your Honorable Court in the *Service* case makes it clear that the question of subterfuge is an analogous situation and the Interstate Commerce Commission, by the same token, would be the proper tribunal to protect the states' interests.

(II) The Findings of the Interstate Commerce Commission Are Supported by Substantial Evidence

A. Scope of Review

The scope of review was adequately set forth in the frequently cited case of *I.C.C. v. Union Pacific R.R. Co.*, 222 U.S. 541, on pages 547-548, 32 S. Ct. 108, 56 L. Ed. 308 (1912), wherein your Honorable Court said:

> "In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. I.C.C., 206 U.S. 441, 51 L. Ed. 1128, 27 Sup. Ct. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the *facts further* than to determine whether there was **substantial evidence** to sustain the order."

B. Analysis of the Evidence

No useful purpose would be served in this Motion to Affirm to detail all the evidence contained in the record

which is relevant to the question of the sufficiency of the evidence to support the finding of subterfuge. The case at bar came before three different levels of authority within the I.C.C. and each one without exception agreed that the evidence established subterfuge. The District Court in its Conclusions of Law finds that "there is overwhelming evidence".

It will suffice for this Motion to quote excerpts from the decision of the Opinion of the full Commission and Division 1 pertaining to the evidence.

The I.C.C. in its report said (see JS 21a-22a):

"Hudson and Arrow solicit freight originating at Philadelphia and destined to Allentown, Pa. They provide a regular service between those two points. Neither holds appropriate intrastate authority, but both are authorized on the face of their interstate certificates to provide the service by routing the involved traffic through New Jersey. The normal route between Philadelphia and Allentown is via U. S. Highway 309, a distance of 52 miles, requiring one hour and 50 minutes of driving time. The distance via Hudson's and Arrow's circuitous interstate routes is over 100 miles requiring three and one-half hours driving time. No stops are made to pick up or deliver freight in New Jersey. No economic justification for the circuitous routing of traffic was shown by either defendant.

"We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points and hold themselves out to serve. We are satisfied, as were division 1 and

the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple."

We also quote from the opinion of Division 1 summarizing the evidence in a similar manner:

"Circuitous routing, between points in a State through another State, in and of itself, is not conclusive evidence of a 'bad faith' interstate operation. But other factors may exist which, when coupled with circuity, warrant a different conclusion. In the proceedings before us the interstate routes utilized by Hudson and Arrow are longer, between the various concerned Pennsylvania points, than are existing all-Pennsylvania routes which are normally used by intrastate carriers. Transporting traffic over the interstate routes, therefore, involves circuitous routing. Here for example, the distance between Arrow's Philadelphia terminal and its Allentown terminal, over its interstate route hereinabove described, is approximately 110 miles. The comparable distance over more direct routes entirely in Pennsylvania, between Philadelphia and Allentown, is approximately 52 miles. Officers of both Hudson and Arrow admit that, absent any regulation of the challenged transportation, shorter or more geographically direct routes would be employed by each in transporting freight from Philadelphia to, for example, Scranton.

"No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to transport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in intrastate traffic purportedly under rights arising from certificates issued by this Commission. All things considered, we are convinced that both Hudson and Arrow have, in their respective operations hereinabove described, by which they have transported freight moving between Pennsylvania points without a prior or subsequent interstate movement, attempted in bad faith to convert, to interstate traffic, traffic which, but for their routing, is actually in intrastate commerce subject to the laws of Pennsylvania."

There may be cases where circuitous routing may not establish subterfuge because of the other facts and evidence in the case. On the other hand, there may be cases where circuitous routing, together with the other evidence, sufficiently establishes subterfuge. This, of course, depends on the justification or lack of justification for the circuitous routing. It is respectfully submitted that no logical reason appears in this record why the circuitous routing by New Jersey has been undertaken, other than for the purpose of converting what normally would be considered intrastate commerce into interstate commerce.

The nub of the evidence establishes that the routes travelled by Arrow via New Jersey are not the normal, logical or usual routes for transportation between Philadelphia and Allentown, and Philadelphia and Scranton and the other points mentioned, Williamsport, Olyphant, etc.

The routes used by Arrow, on the contrary, are unreasonably and excessively circuitous, involving as much as twice the distance. The usual and normal routes for the points served by Arrow within Pennsylvania are situated entirely within the Commonwealth of Pennsylvania.

In the transportation involved in this case, no stops are made at any time in New Jersey to pick up or deliver freight there. The President of Arrow, John E. Ackerman, admitted in his testimony that in the absence of regulation his company would not go into New Jersey but would use the Pennsylvania Turnpike.

No logical reason or justification appears for routing state freight by way of New Jersey other than to "convert" what is intrastate commerce into interstate commerce. All that Arrow is doing by taking the freight into New Jersey is giving the freight a free ride for 50 extra miles into the State of New Jersey. These and other facts not only constitute substantial evidence, but overwhelming evidence, we submit, of subterfuge.

The Hearing Examiner in his report summarizes the evidence in the following excerpt:

> ". . . subterfuge by . . . Arrow is shown . . . (b) by the handling of a *substantial* volume of intrastate traffic which moves solely between an origin point in Pennsylvania and a destination point in the same State, (c) by advertising direct service on shipments of this traffic, (d) by the movement of this traffic in New Jersey with no stops in that State to pick up or deliver freight, except the stops made by Arrow at its Phillipsburg terminal, (e) by the transportation of this intrastate traffic over interstate routes which are about 100 percent longer than the existing intra-

state routes from Philadelphia to Allentown, and somewhat longer than the existing intrastate routes from Philadelphia to Scranton, and (f) by admissions on the part of . . . Arrow that if no intrastate authority or interstate authority was required for the movement of this traffic, these carriers probably would transport the freight over the shorter and more direct intrastate routes. . ."

We believe what was said in *Swift & Co. v. U. S.*, 343 U.S. 373, 72 S. Ct. 716, 96 L. Ed. 1008 (1952), is apropos: "When that judgment [of the I.C.C.] is based on findings abundantly supported by the evidence on the whole record, as it is in this case, it is the duty of the courts to sustain it (citations omitted)."

(III) The I.C.C. Did Not Place the Burden of Proof Upon Plaintiff

One last point requires comment. Appellant argues that the I.C.C. improperly placed the burden of proof upon appellant when it *found as a fact* that appellant had no economic justification for operating 110 miles into New Jersey when it could travel 52 miles in Pennsylvania to get to the same place. Every carrier, of course, attempts to maximize profits by reducing expenses. Extra mileage means extra wear and tear, extra gas, extra driving, extra wages, etc. What reason would a prudent carrier have for engaging in what obviously is an uneconomic and wasteful mode of operation **other than to circumvent Pennsylvania regulatory control?**

Nowhere does the I.C.C. lay the burden of proof upon the plaintiff in our complaint proceeding. But it can *find* as a *fact* that no economic justification exists.

Findings of this nature are made in many instances. For example, in criminal law where a defendant is found in possession of recently stolen goods, he should explain how he came by it. The failure of explanation can be found to be a factor in establishing guilt. At no time does the burden of proving criminality shift from the State to the defendant.

This type of fact-finding (i.e., that there was no reason for it, there was no justification for it, etc.) exists in many situations, and does not affect the burden of proof. It may, of course, shift the burden of going forward, which

happens on many occasions according to our rules of evidence where a prima facie showing is made and the means of explanation are within the exclusive knowledge of the defendant.

If citation is necessary on the point in question, the *Eichholz* case may be cited. There the Federal District Court, which held the transportation to be a subterfuge and refused an injunction, said during the course of its opinion, 23 Fed. Supp. p. 591:

> "In this case the plaintiff hauled truckloads of merchandise from shippers or consignors in St. Louis, Mo., to consignees in Kansas City, Mo. It was neither a normal nor a natural route, to extend the carriage to the terminal depot in Kansas City, Kansas. **There was no reason for it.** It was not a matter of convenience to the shipper, nor was it a matter of convenience to the carrier. Immediately that the haul terminated at the depot or terminal in Kansas City, Kansas, a new driver and in some instances with the same tractor took the merchandise or property back over the same traffic way and effected immediate delivery in Kansas City, Missouri. It was patent that the object of the shipper was to secure the benefit of a lower tariff by converting the shipment into an interstate haul."

VII. CONCLUSION

The entire record, which consists of the notes of testimony taken in both the *Hudson* and *Arrow* cases, contains a great deal of evidence on the issue of subterfuge. Not only was circuity established, but also a number of other factors which would be inconsistent with bona fide and legitimate activity normally associated with genuine operations. In this case we have uneconomical operations, wasteful operations, out-of-the-way routes, misleading advertising, a substantial traffic in local business intended to divert business from intrastate carriers, and so on.

The Interstate Commerce Commission did not place the burden upon Arrow Carrier Corporation, but merely found as a fact, that there was no economic justification for the transportation, which was a factor it had a right to consider.

The Interstate Commerce Commission's reasoning in its opinion is flawless. It very astutely reasoned that if the kind of subterfuge engaged in by plaintiff did not violate the Interstate Commerce Act, the Commission would have no jurisdiction even to entertain a complaint filed under Section 204(c) of the Act. This section gives direct authority to the Commission to investigate alleged violations of the Interstate Commerce Act, and to issue appropriate orders to compel compliance.

The Interstate Commerce Commission went on to say that obviously the Supreme Court of the United States

in the *Service Storage* case would not have suggested to the Commonwealth of Virginia a remedy that was in fact not available. That cooperation between the federal government and the several states is woven by necessary implication into the fabric of the Motor Carrier Act of 1935 is evidenced by the national transportation policy, the multitude of provisions in the Act dealing with federal-state coordination and cooperation, the underlying purposes of the legislation, etc.

The decision of the Interstate Commerce Commission in this case protects the respective spheres of governmental action and quashes undesirable and unwanted gypsy-like activity. We commend the I.C.C. decision as a truly well thought out and excellently worded statement of what the law is in this delegated area of regulation.

There is no confusion in the law. The instant case is a logical sequel to the *Service* case. The question of subterfuge is one of fact. As was said in *Eichholz v. P. S.C.*, 306 U.S. 268 at page 275: "The ultimate question is thus one of fact. . ."

The decision of the District Court in this case does not cast any doubt upon *Greyhound Lines*, or the other decisions, since *Greyhound Lines* expressly recognizes the principle of subterfuge.

Wherefore, we respectfully submit that the I.C.C. decision in this case has a very rational basis, is well documented by legal reasoning, strongly substantiated by evidentiary support, and extremely sound as a matter of logic. We further respectfully submit, therefore, that the appellant presents no substantial question for the decision

of this Court, and we pray that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

WILLIAM A. GOICHMAN
Assistant Counsel
JOSEPH C. BRUNO
Chief Counsel
for Pennsylvania Public Utility Commission

127 North Office Building
Harrisburg, Pennsylvania
October 8, 1963.

APPENDIX A

INTERSTATE COMMERCE COMMISSION

Served May 16, 1960

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-C-2671 [1]

[1] This report also embraces No. MC-C-2696, Pennsylvania Public Utility Commission v. Arrow Carrier Corporation; No. MC-113933, Hudson Transportation Company—Petition for Declaratory Order; and Nos. MC-71536, MC-71536 (Sub-Nos. 1, 2, and 3), Arrow Carrier Corporation—Petition for Declaratory Order.

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

HUDSON TRANSPORTATION COMPANY

Decided .....

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1. In No. MC-C-2671 and No. MC-C-2696, defendants found to be performing unauthorized transportation as a motor carrier of certain traffic between specified points in Pennsylvania via points in New Jersey. Cease and desist order entered.

2. In No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2, and 3), determination of all matters to which the petitioners' petitions are directed found to have been determined in the complaint proceedings. Petitions denied.

William A. Goichman for complainant in No. MC-C-2671 and No. MC-2696, and intervenor in opposition to the petitioners in Nos. MC-113933, and MC-71536 and MC-71536 (Sub-Nos. 1, 2, and 3).

Richard V. Zug and *August W. Heckman* for petitioner in No. MC-113933, and defendant in No. MC-C-2671.

Christian V. Graf and *Spencer R. Liverant* for petitioner in No. MC-71536 and No. MC-71536 (Sub-Nos. 1, 2, and 3), and intervenor in support of petitioner in No. MC-113933.

Edwin A. Gehring for intervenor in support of petitioner in No. MC-113933, and in opposition to other petitioner.

Paul F. Barnes for intervenors in support of complainants and in opposition to the petitioners.

REPORT AND ORDER

RECOMMENDED BY H. L. HANBACK, HEARING EXAMINER

By complaint in No. MC-C-2671, filed August 24, 1959, Pennsylvania Public Utility Commission, hereinafter called P.U.C., or complainant, alleges in effect that Hudson Transportation Company, hereinafter called defendant, or Hudson, or petitioner, has transported property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained certificates of public convenience and necessity from the Interstate Commerce Commission, as required by sections 203(c) and 206(1) of the Federal Motor Carrier Act, or having obtained a certificate of public convenience from P.U.C., as required by section 202(b) and 202(c) of the Public Utility Law, and as a subterfuge to the jurisdiction of complainant.

By complaint in No. MC-C-2696, filed October 8, 1959, P.U.C. alleges in effect that Arrow Carrier Corporation, hereinafter called defendant, or Arrow, or petitioner, has transported property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained a certificate of public convenience and necessity from the Interstate Commerce Commission, as required by sections 203(c) and 206(1) of the act, or having obtained a certificate of public convenience from P.U.C. as required by sections 202(b) and 202(c) of the Public Utility Law, and as a subterfuge to the jurisdiction of complainant.

Complainant also urges the Commission to issue an order requiring each defendant to cease and desist from the alleged violations of the Federal Motor Carrier Act

and the Public Utility Law of Pennsylvania. Answers to the complaints were filed by defendants.

By petition filed by Hudson on October 23, 1958, in No. MC-113933 and by petition filed by Arrow on August 31, 1959, in No. MC-71536 and Sub-Nos. 1, 2, and 3, each petitioner requests an order interpreting its outstanding certificates; or, that the Commission enter a declaratory order finding; (1) that its certificates were not intended to, nor do they, limit the transportation to shipments moving between points in Pennsylvania, on the one hand, to points in other States, on the other; and (2) that petitioner under its certificates may conduct interstate operations between Pennsylvania points through the New Jersey gateway to the extent specified in its certificates and may interchange or interline shipments moving from or to points in Pennsylvania beyond its authorized areas of service with connecting interstate carriers so long as such traffic moves through New Jersey. They urge the Commission to issue such order or orders as may be proper in the premises.

The complaints and petitions were referred to the examiner for hearing and the recommendation of an appropriate order thereon. The complaints in Nos. MC-C-2671 and MC-C-2696, and the petitions were heard on a consolidated record at Philadelphia, Pa., on October 13, and 14, and December 3, 1959. Highway Express Lines, Inc., Rodgers Motor Lines, Inc., Fowler and Williams, Inc., and Modern Transfer Co., Inc., support the complaints, and oppose the petitions. Arrow supports the petition of Hudson. Motor Freight Express supports the petition of Hudson, and oppose the petition of Arrow. Complainant opposes each petition. Briefs were seasonably filed by complainant and defendants, and by intervenors who support the complaints.

Complainant points out that in 1958 it determined that Hudson and certain other carriers, including Jones Motor Co., were transporting Pennsylvania intrastate traffic between the points here involved via New Jersey points as a subterfuge to avoid its jurisdiction, that it issued cease and desist orders, and that the complaints here involved were filed as a result of recent decisions of the United States Supreme Court in *Service Storage and Transfer Co., Inc. v. Commonwealth of Virginia*, 359 U.S. 171, and *Jones Motor Co. v. Pa. P.U.C.*, 361 U.S. 11, in which the State Commissions were reversed for lack of jurisdiction.

The complainant in No. MC-C-2671 alleges and Hudson admits, that during the period about January 10, 1958 to August 29, 1958, that carrier transported a total of about 49 shipments of freight from Philadelphia to 22 points in Pennsylvania within 40 miles of Stroudsburg, including Scranton and Allentown, that during the same period Hudson transported a total of five shipments from Scranton, Wilkes-Barre, West Pittston, West Wyoming and Kingston, Pa., to Philadelphia, and that all of these shipments moved through a point or points in New Jersey. The complainant in No. MC-C-2696 alleges and Arrow admits, that during the period about July 31, 1958 to August 23, 1958, that carrier transported a total of 10 shipments of freight from Scranton, Bangor, Allentown, Shamokin, Wilkes-Barre and Swoyersville, Pa., to Philadelphia, that during the same period Arrow transported a total of seven shipments of freight from Philadelphia to Catasauqua, Muncy, Shamokin, White Haven, and Scranton, Pa., and that all of these shipments moved through a point or points in New Jersey.

Three investigators employed by P.U.C. used a car to follow the vehicles utilized by Hudson and Arrow in the

movement of the shipments described in the complaints. One of the investigators recalled, for example, that on August 13, 1958, Hudson's loaded truck traveled from Philadelphia over the Tacony-Palmyra Bridge and New Jersey Highway 73 to junction U. S. Highways 130, thence over U. S. Highways 130 and 206 to Trenton, thence over New Jersey Highway 69 to junction U. S. Highway 46 to junction U. S. Highway 611 near Columbia, N. J., and thence over U. S. Highway 611 via Stroudsburg, Pa., to the carrier's terminal in Scranton, about 160 miles, and that no stops were made to pickup or deliver freight at any point in New Jersey. Another investigator recalled that on August 28, 1958, a Hudson tractor and trailer arrived at Bartonsville, Pa., on U. S. Highway 611, and from that point the vehicle traveled over Pennsylvania Highways 12, 512 and 946 via Wind Gap and Bath Pa., to Hudson's terminal in Allentown, thence over U. S. Highway 22 via Phillipsburg, N. J., to junction New Jersey Highway 69, and thence over the route described above via Trenton to the terminal of Williams Begley in Philadelphia. He also recalled that on August 29, 1958, the same tractor and trailer traveled from Philadelphia to Bartsonville over the above-described route via Allentown, and thence over U. S. Highway 611 to the carrier's terminal in Scranton, that on September 11 and 12, 1958, another Hudson tractor and trailer traveled over this route in each direction between Philadelphia and Scranton, and that the distances over the routes traveled from Philadelphia to Allentown and Scranton is about 106 miles, and 185 miles, respectively. The driving time to Scranton is about 5 1/6 hours. The vehicles followed by this witness were not stopped to pickup or deliver freight at any point in New Jersey. This witness also followed Arrow's truck on November 19, 1959, from Scranton over Pennsylvania Highway 307 to junction U. S. Highway 611,

thence over U. S. Highway 611 to junction U. S. Highway 46, thence over U. S. Highway 46 via Columbia, N. J., to junction New Jersey Highway 519, thence over New Jersey Highway 519 to junction New Jersey Highway 24 and thence over New Jersey Highway 24 to Phillipsburg. The distance over this route is about 75 2/10 miles. He also followed Arrow's truck on October 29, 1959 from Philadelphia over U. S. Highway 1 to Trenton, thence over New Jersey Highway 69 to junction U. S. Highway 22 at Clinton Corners, N. J., thence over U. S. Highway 22 to Phillipsburg, and the driving time was about 2 1/2 hours. On October 2, 1959, another investigator drove his car over U. S. Highway 309 from Arrows' terminal in Philadelphia to the carrier's terminal in Allentown. The speedometer on the car registered 52 4/10 miles, and the driving time was about 1 5/6 hours. This witness also drove his car on October 23, 1959, from Arrows' terminal in Philadelphia over the Pennsylvania Turnpike Extension and connecting highways to the carriers' terminal in Allentown. The speedometer on the car registered 71 miles, and the driving time was 2 hours and 3 minutes.

Modern Transfer Company holds Pennsylvania intrastate authority which is utilized by that carrier in the transportation of general intrastate freight between its terminals at Philadelphia and Allentown over U. S. Highway 309, about 52 miles, and the average driving time is about two hours in each direction. Its representative is aware that the route used by it is the most direct and shortest route between Philadelphia and Allentown.

Highway Express Lines holds Pennsylvania intrastate authority which is used in the transportation of general intrastate freight from Philadelphia over unspecified highways to King of Prussia, Pa., thence over U. S. Highway

202 to junction U. S. Highway 309, thence over U. S. Highway 309 to Central Valley, Pa., thence over Pennsylvania Highway 12 to Bethlehem, Pa., thence over Pennsylvania Highways 512 and 12 via Bath and Wind Gap, Pa., to Bartonsville, Pa., thence over U. S. Highway 611 to Scranton, and return over the same route. The distance over this route from the carrier's terminal in Philadelphia to its terminal in Scranton is between 130 and 135 miles, and the average driving time is between 4 1/2 and 4 3/4 hours in each direction. The route used by this carrier is termed the most direct and shortest route between Philadelphia and Scranton.

Hudson is operating under certificated rights purchased from Joseph Kowaski. On June 5, 1945, Kowaski purchased certificate No. 30001 (Sub-No. 1) from Bushnell Carrier, Inc. This certificate authorized, so far as here pertinent, the transportation of general commodities, with the usual exceptions, between Stroudsburg, Pa., and points within 40 miles thereof, on the one hand, and, on the other New York, N. Y., and points in Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset, Sussex, Union, and Warren Counties, N. J., over irregular routes. The transaction was approved in MC-FC-20109. On January 3, 1946, Kowaski purchased certificate No. MC-30001 from the same carrier. This certificate authorized, so far as here material, the transportation of general commodities, with the usual exceptions, between Philadelphia, Pa., on the one hand, and, on the other, points in Warren, Sussex, Morris, and Somerset Counties, N. J., over irregular routes. Consolidated certificate No. MC-105946, comprising the purchased rights, was issued to Kowaski on June 16, 1950. Purchased by Hudson of the certificated rights held by Kowaski was approved December 15, 1952, in No. MC-FC-

53921, and certificate No. MC-113933, comprising these operating rights was issued to Hudson on June 9, 1953. The authority to operate between Philadelphia and points in New Jersey is described in one paragraph, and the authority to operate between New Jersey points and points in the Stroudsburg area is described in another paragraph in the same certificate. All points in Warren County, including Phillipsburg, Buttzville, and Dunnfield, N. J., are authorized points of service in connection with the separately described operating authorities. Since about October 7, 1956, Hudson has been tacking the separately described authorities operating through a point or points in Warren County, and providing overnight service daily on trailerloads of general freight between Philadelphia, on the one hand, and, on othe other, various Pennsylvania points within 40 miles of Stroudsburg. Shipments from Philadelphia to Scranton and other points in the northern portion of the Stroudsburg area, hereinafter called the Scranton area, are transported daily from Philadelphia across the Tacony-Palmyra Bridge and over New Jersey Highway 73 to junction U. S. Highway 130, thence over U. S. Highway 130 to junction U. S. Highway 206, thence over U. S. Highway 206 to Trenton, N. J., thence over New Jersey Highway 69 to junction U. S. Highway 22 at Clinton Corners, N. J., thence over New Jersey Highway 69 to junction U. S. Highway 46, thence over U. S. Highway 46 to junction U. S. Highway 611, at or near Columbia, N. J., thence over U. S. Highway 611 via Stroudsburg and Bartonsville, Pa., to Hudson's terminal in Scranton. That portion of the freight destined to other points in the Scranton area is handled in a pickup and delivery truck which operates out of the Scranton terminal. This route is also used for the movement of southbound traffic from Scranton and points in the Scranton area to Philadelphia. Ship-

ments from Philadelphia to Allentown and other points in the southern portion of the Stroudsburg area, hereinafter called the Allentown area, are transported daily over the routes described above to junction U. S. Highway 22 at Clinton Corners, thence over U. S. Highway 22 via Phillipsburg to the Allentown terminal. Freight destined to other points in the Allentown area is handled in a pickup and delivery truck that operates out of the Allentown terminal. On occasions when the tonnage available for movement from Philadelphia to Allentown and Scranton can be transported in a single vehicle, Hudson transports the freight over above-described route via Phillipsburg to Allentown, and, after delivery of the Allentown freight the road truck is dispatched from that point over U. S. Highway 22 to junction Pennsylvania Highway 987, thence over Pennsylvania Highways 987, 512, and 12 via Bath and Wind Gap, Pa., to Bartonsville, thence over U. S. Highways 611 to Scranton. This route is also used on occasion for the movement of southbound freight from Scranton to Philadelphia. A substantial portion of the freight transported between the Pennsylvania points here involved is traffic that originates at Philadelphia and terminates at points within 40 miles of Stroudsburg, or freight which originates at points in the 40-mile area and terminates at Philadelphia. Other traffic handled between these points consists of interline freight which originates at points outside of Pennsylvania and is received from connecting carriers in Philadelphia, or interline traffic which originates at points in the Stroudsburg area and is transferred to connecting carriers at Philadelphia. The interline freight and other freight is transported in the same vehicle. The distance from Hudson's terminal in Philadelphia to its terminal in Scranton over the route via Columbia and Stroudsburg is approximately 160 miles and the

driving time between the terminals is about 5-1/10 hours. The distance from the terminal in Philadelphia to the terminal in Allentown over the route via Phillipsburg is approximately 106 miles and the driving time is about 3-1/2 hours. The distance from the terminal in Philadelphia to the terminal in Scranton via Phillipsburg and Allentown is approximately 184 miles, and the driving time is about 5-1/6 hours. In performing service, in each direction between the Pennsylvania points here involved, Hudson's vehicles are not stopped to pickup or deliver freight at any point in New Jersey. Hudson has several freight solicitors in the Pennsylvania area here involved. Direct service by this carrier between Philadelphia and other Pennsylvania points is advertised in telephone directories, certain tariffs, and other publications, and it distributes a point list purporting to show available service between Philadelphia and over 300 Pennsylvania points including some points which are located beyond the Stroudsburg area. For the 6-month period ending June 30, 1959, Hudson received a gross revenue of about $593,000 from operations performed between all authorized points, including a gross revenue of approximately $51,000 from the northbound traffic transported from Philadelphia to other Pennsylvania points via Trenton.

As pertinent, Arrow holds certificates Nos. MC-71536, MC-71536 (Sub-No. 1), and MC-71536 (Sub-No. 3), hereinafter called the original certificate, Sub-1 and Sub-3, respectively, authorizing the transportation of general commodities, with certain exceptions, between the points and over the regular routes described in appendix A hereto, serving all intermediate points, and the described off-route points. The original certificate was issued to Arrow on December 16, 1942, as a result of operations conducted by

it prior to and after June 1, 1935, the critical "grandfather" date. The operating rights described in Sub-1 were originally granted to Lehigh Valley Motor Express Corporation, hereinafter called Lehigh, on February 10, 1938, in MC-58970, and reported in 6 M.C.C. 89. The operating rights of Lehigh were purchased by Arrow, on November 12, 1938, and the transaction was approved in MC-F-596, reported in 15 M.C.C. 203. Sub-3 certificate was issued to Arrow on May 22, 1957. This operating authority was purchased from Rudolph Freight Lines, and the transaction was approved in MC-F-6356. Arrow has intrastate authority to serve some Pennsylvania points not including Philadelphia or points in the Philadelphia area.

Arrow maintains terminals at Carlstadt and Phillipsburg, N. J., and Allentown, Schuylkill Haven, Shamokin, Williamsport, Hazleton, Scranton, and Philadelphia, Pa. The Philadelphia terminal was established about April 15, 1959. During the period about May 22, 1957, to April 15, 1959, Arrow had a terminal in Camden, N. J. It operates a number of road tractors and trailers, and has local pickup and delivery trucks, and peddle runs operating out of each terminal. Arrow has been tacking its operating authorities at certain points, and providing service daily on truckload traffic and loads of less-than-truckload freight between Philadelphia, on the one hand, and, on the other authorized Pennsylvania points via certain points in New Jersey. The traffic transported by Arrow between the Pennsylvania points here involved includes (1) freight originating at Philadelphia and destined to other Pennsylvania points here involved, (2) freight originating at points in Pennsylvania and destined to Philadelphia, and (3) freight originating at or destined to points outside of Pennsylvania, and received from or delivered to connecting

carriers at Philadelphia. The freight is handled on overnight schedules, and the shipments average about 20,000 pounds each.

For the purpose of clarity of discussion, the routes which are tacked or combined by Arrow for the purpose of performing through service between Philadelphia and other Pennsylvania points are identified in the appendix as (A), and (A-1) in Sub-3, (B), (B-1), (C), (C-1), (D), and (E) in Sub-1, and (E-1), (E-2), (F), (G), and (H) in the original certificate. Since about May 22, 1957, shipments received or picked up at Philadelphia and points within 15 miles thereof including Fort Washington, Pa., and destined to other Pennsylvania points herein involved, have been transported in Arrow's road trucks that operate on regular round-trip runs between Philadelphia and the Allentown terminal. Prior to about April 15, 1959, the outbound freight from Philadelphia was transported over the Tacony-Palmyra Bridge and New Jersey Highway 73 to junction U. S. Highway 130, thence over U. S. Highways 130 and 206 to Trenton under irregular route authority described in (A-1) of Sub-3, thence over New Jersey Highway 69 to junction U. S. Highway 22 at Clinton Corners, N. J., under authority described in (B) of Sub-1, thence over U. S. Highway 22 via Phillipsburg to Easton, Pa., under authority described in (C) of Sub-1, and thence over U. S. Highway 22 to Allentown under authority described in (D) of Sub-1, or (G) of original certificate. The equipment was stopped en route at the Phillipsburg terminal to unload freight destined to the terminal at Scranton, and also to unload freight for local delivery in the Phillipsburg area, including Bangor, Pa. Upon arrival of the truck at the terminal in Allentown, the balance of the load was unloaded and that portion of the freight destined to points

beyond Allentown was picked up and delivered by a truck that operates on a scheduled run from Carlstadt, N. J., to these points via Allentown, under authority described in Sub-1 or the original certificate. For example, the freight destined to Hazleton and off-route points in the Hazleton area, including White Haven, moved in the Carlstadt truck from the Allentown terminal over U. S. Highway 309 and Pennsylvania Highway 29 to the termnial at Hazleton, under authority described in (G) of the original certificate, and the freight destined to White Haven and other off-route points was delivered in a pickup and delivery truck under the off-route authority described in (G) of the original certificate. The freight destined to the terminals at Shamokin, Sunbury and Williamsport, moved in the Carlstadt truck from Allentown, over U. S. Highway 22 to the terminal at Shamokin, thence over U. S. Highway 120 to the terminal at Sunbury, and thence over Pennsylvania Highway 14 to the terminal at Williamsport, under authority described in (F) of the original certificate. The freight shipped to points in the Williamsport area including Muncy, Pa., was delivered from the Williamsport terminal in pickup and delivery trucks under the off-route authority described in (H) of the original certificate. The freight which was shipped from Philadelphia to the Scranton terminal and unloaded at the terminal in Phillipsburg, was picked up at that point by a truck that operated on a regular run from Carlstadt over U. S. Highway 46 to Hackettstown, N. J., thence over New Jersey Highway 24 to Phillipsburg, thence over U. S. Highway 22 to Easton, thence over U. S. Highway 611 via Stroudsburg to the Scranton termnial, and return over the same route. The movement described above from Phillipsburg to Easton was performed under the authority described in (F) or (G) of the original certificate, or (C) of Sub-1. The movement

from Easton to Stroudsburg was performed under authority described in (E-1), and the movement from Stroudsburg to the terminal at Scranton was performed under authority described in (E-2), of the original certificate. The freight which was destined to points in the Wilkes-Barre area, including Swoyersville, and the freight destined to off-route points in the Scranton and Stroudsburg area including East Stroudsburg, Pa., were delivered from the Scranton terminal in pickup and delivery trucks under the authority described in (H) of the original certificate. The truck used on the Philadelphia-Allentown run picked up freight at the Allentown terminal and returned to Philadelphia over above-described routes via Phillipsburg and Trenton, and the vehicle was stopped at the Phillipsburg terminal to pickup freight delivered at that terminal by the Carlstadt truck. The operations performed by Arrow since April 15, 1959, are similar to those performed by it prior to that date in the movement of the traffic here involved, except that the carrier now utilizes U. S. Highway 1 between Trenton and its terminal in Philadelphia under regular route authority described in (A) of Sub-3. Freight shipped, for example, from some points within 15 miles of Philadelphia, including Fort Washington, to Pennsylvania points via New Jersey is handled as far as Trenton under the authority described in (A), or (A-1) of Sub-3 or combination thereof.

The distance from Arrow's terminal in Philadelphia to its terminal in Scranton over above-described route via Trenton, Phillipsburg, Easton and Stroudsburg is about 160 miles, and the average driving time is about 5 1/10 hours in each direction.

The distance from Arrow's terminal in Philadelphia to its terminal in Allentown over above-described route via

Trenton and Phillipsburg is between 105 and 110 miles, and the average driving time is about 3½ hours in each direction. Arrow points out that the carrier's authorities can be tacked at Allentown for the purpose of transporting Scranton freight from Philadelphia over above-described route via Phillipsburg to Allentown, and thence over U. S. Highway 309 and connecting routes to Scranton, under authority described in (A) of Sub-3, and (B), (C), (D) and (E) of Sub-1. The record indicates that the distance over this route from the Philadelphia terminal to the terminal in Scranton is between 181 and 188 miles. Arrow also has the conviction that its authority in (A) of Sub-3, could be combined at Trenton, with the authority described in (B-1) of Sub-1, and the latter could be combined at Morrisville, Pa., with the authority described in (C-1) of Sub-1, for the purpose of providing through service on shipments of freight from Philadelphia to Allentown over a route via Trenton, and Morrisville, Yardley, Newtown, and Buckingham, Pa., approximately 85 miles; however, no shipments have been transported over this route. Morrisville is located about one mile west of Trenton. The speedometer on a car driven by Arrow's representative from its terminal in Philadelphia to the carrier's terminal in Allentown over U. S. Highway 309, the shortest intrastate route, registered about 57 miles. He is also aware that intrastate traffic could be transported by authorized carriers over the Pennsylvania Turnpike from Philadelphia to Allentown and Scranton.

Arrow utilizes telephone directories, newspapers, certain tariffs, and other means to advertise direct service between Philadelphia and other Pennsylvania points. In April 1959, it was transporting only one trailerload of freight a night between these points. At the time of hear-

ing, it was transporting between Philadelphia and Pennsylvania points three or four loads of northbound freight and two or three loads southbound each night. These shipments averaged about 20,000 pounds each.

On brief, complainant contends (1) that the two paragraphs in Hudson's certificates constitute a single grant of irregular-route authority and, consequently, may not lawfully be tacked together for the purpose of providing through service, (2) that in the transportation of traffic between the points here involved, Hudson has converted its irregular-route authority to unauthorized regular-route operations, (3) that by tacking its authority, Hudson is also performing unauthorized cross-haul operations between two or more points in the same radial area it is authorized to serve, (4) that Arrow, by means of its several tacking methods described above, is making double use of single grants of authority, which is not permissible, (5) that subterfuge by Hudson and Arrow is shown (a) by unauthorized tacking practices, (b) by the handling of a substantial volume of intrastate traffic which moves solely between an origin point in Pennsylvania and a destination point in the same State, (c) by advertising direct service on shipments of this traffic (d) by the movement of this traffic on regular runs daily over regular routes via points in New Jersey with no stops at points in that State to pick up or deliver freight, except the stops made by Arrow at its Phillipsburg terminal, (e) by the transportation of this intrastate traffic over interstate routes which are about 100 percent longer than the existing intrastate routes from Philadelphia to Allentown, and somewhat longer than the existing intrastate routes from Philadelphia to Scranton, and (f) by admissions on the part of Hudson and Arrow that if no intrastate authority or interstate authority was

required for the movement of this traffic, these carriers probably would transport the freight over the shorter and more direct intrastate routes, and (6) that tacking is not authorized by the act.

With respect to the contention in (6) above, complainant admits that this argument is perhaps more to be addressed to the Supreme Court than to the Commission, for the reason that the Commission has authorized tacking since the *Keeshin Motor Express Co., Inc. (Ill.)—Lessor*, 1 M.C.C.373 (1936), without specific proof of necessity, and that the lower federal courts have approved such authorization. However, complainant argues that the Federal act was patterned after the State acts which require proof of public convenience and necessity to warrant approval of the tacking of operating authorities, and therefore appears to have also inherently the same restrictions against tacking, and that the facts of record show a need, and provide opportunity for the Commission to reconsider the propriety of the doctrine which has luxuriated out of the *Keeshin* decision, and, at least, to limit use of that doctrine so that the announced intent of the Congress may not be evaded.

Complainant also argues, in effect, that tacking is not properly to be applied literally as between places in the same State if the underlying considerations of the Federal act, the purposes behind tacking, and the Federal-State relationships are to be maintained and promoted: that the evils of tacking are not fanciful or imaginery, that a tacking carrier can choose the cream of traffic in selected areas while the licensed State carriers may be burdened with the movement of less remunerative traffic to their detriment, and that the tacking practices indulged in by the interstate carriers has resulted in a situation where the

State cannot guarantee a quasi-monopoly to its licensed carriers, and the Commission cannot guarantee regulated competition.

Complainant also cites several cases, including *Interstate Common Carrier Council v. U. S.*, 84 F. Supp. 414, 417, 338 U.S. 843, *Michigan Motor Freight Lines v. U. S.*, 113 F. Supp. 812 and 819, in which the Supreme Court upheld the Commission in its refusal to approve motor carrier operations over alternate routes, or to permit the merger and unification of operating rights, for the reasons (1) that the service routes of the carriers which sought alternate-route authority were too circuitous to be regarded as noncompetitive, and (2) that the routes which were proposed to be used by unification of operations were excessively circuitous compared to direct routes between the points proposed to be served. It also points out that in *Creston Transfer Co., Extension—California*, 73 M.C.C. 645, the Commission refused to remove a restriction against tacking, for the reason that the carrier's rights were dependent upon a circuitous mode of tacking. It argues that the same principles of tacking apply in the instant proceedings with equal force and effect.

In their brief, supporting intervenors concur in the contentions and arguments of complainant in respect of intrastate traffic. They also urge that the petitions of Hudson and Arrow be denied for the reason that the issues raised in the petitions can and should be disposed of in the complainant proceedings.

In separate briefs, Hudson and Arrow contend in effect that in the transportation of traffic between the points involved, and in the manner described above, each carrier is employing lawful tacking methods and providing

bona fide operations free of subterfuge, for the reasons (1) that the right to tack operating authorities for the purpose of providing bona fide through service, has been recognized by the Commission in a number of cases including *Aetna Freight Lines, Inc—Interpretation of Certificate*, 48 M.C.C. 610, hereinafter called Aetna case, and (2) that the right to perform bona fide operations in the transportation of traffic between two points in a single State by tacking in another State, is provided for in section 203 (a)(10) of the act, and also that the right to perform this type of operation has also been recognized (a) by the Commission in *Dixie Freight Lines, Inc.—Common Carrier Application*, 24 M.C.C. 780, *Atlantic Freight Lines—Petition for Declaratory Order*, 51 M.C.C. 175, and *Service Storage & Transfer Co., Inc.—Petition for Declaratory Order*, 71 M.C.C. 304, hereinafter called *Dixie* case, *Atlantic* case, and *Service Storage* case, respectively, and (b) by the Supreme Court in the *Service* case and *Jones* case, supra, (3) that in the movement of traffic by each carrier between Philadelphia and other Pennsylvania points via New Jersey, their operations are performed openly and without any concealment, (4) that freight shipped between points in Pennsylvania, and interline freight shipped from points in a number of States to points in Pennsylvania and vice versa, is transported in the same vehicle, (5) that the terminals at Philadelphia, Allentown, and Scranton are also used for the handling of interstate traffic shipped from Pennsylvania points to the carrier's authorized points in New Jersey and New York, and vice versa, (6) that each carrier is a party to the Middle Atlantic Motor Carriers Conference Tariffs, and the rates charged are generally the same as those of the intrastate carriers, (7) that Hudson and Arrow could not transport the traffic here involved over Pennsylvania intrastate routes if they de-

sired, because they are not authorized to use those routes, and (8) that in the movement of the involved traffic each carrier must traverse the only authorized routes available to it, namely, those by way of New Jersey.

They also point out that from Philadelphia to Scranton, the distance and driving time over the intrastate routes and the routes via New Jersey are not substantially different, that the route used by each from Philadelphia to Allentown is identical to the route used by Jones Motor Co., for the movement of traffic between those points, and they contend that in the *Jones* case the U. S. Supreme Court in reversing P.U.C., and the Superior Court of Pennsylvania ruled in effect an operation from Philadelphia to Allentown via Clinton by tacking interstate authorities is not, per se, a subterfuge.

The record indicates that the Supreme Court's ruling in the *Jones* case was a procedural ruling to enable P.U.C., if it believed that Jones' operation was not bona fide interstate but merely a subterfuge to escape its jurisdiction, to avail itself of the remedy Congress has provided in section 204(c) of the act.

With respect to tacking, it is well settled that a motor common carrier may tack its operating authorities for the purpose of performing bona fide through service on shipments of interstate commerce. For example, in the *Aetna* case the Commission, division 5 stated:

> "The right of a motor common carrier to tack separate grants of unrestricted authorities is well settled regardless of whether the authorities involve regular routes, irregular routes, or a combination of both. The only requirements in such instances has been that there must be a point of service common to both op-

erating authorities, the physical operation must be rendered through such common point, and the character of the authorized services (either regular or irregular route) must be preserved."

In *Donald B. Zirbel-Investigation of Operations*, 54 M. C.C. 409, at page 411, hereinafter called the *Zirbel* case, the Commission stated:

"It is axiomatic that only a single grant of irregular-route authority can emendate from one proceeding. It is not uncommon to describe such single or separate grant of irregular-route authority, especially radial authority, in two or more paragraphs or parts in the certificate or permit subsequently issued. The No. MC-471 (Sub-No. 1) certificate now held by respondent is typical of this practice. It necessarily follows that a motor carrier, such as respondent, lawfully may not combine or tack two or more irregular-route services authorized by one grant of authority even though described in separate paragraphs of a single grant certificate, and thus perform an entirely different or more extensive service in the absence of specific authorization for that joinder in the certificate itself."

Complainant relies on the principles enunciated in the *Zirbel* case and adhered to in several other cases to support its contention that Hudson is unlawfully tacking two paragraphs of a single grant certificate in providing service between the points here involved, including cross hauls. The cases cited by complainant are not controlling here, for the reasons that Hudson's authority between Philadelphia and points in Warren County, on the one hand, and, on the other, was obtained by its predecessor in one preceding No. MC-30001 (Sub-No. 1), and Hudson's authority between Philadelphia and points, in Warren County was

obtained by its predecessor in a separate proceeding (No. MC-30001), that the authorities are not restricted against tacking, that the separately granted authorities may be tacked at any point in Warren County for the purpose of performing bona fide through service in the movement of interstate traffic over logical and normal routes, provided the routes are not used to avoid State regulation, and that Hudson has not made double use of a single grant, or combined the separate grants for the purpose of performing cross-hauls between two points in the same authorized radial area.

Arrow may also tack its regular-route authorities in the manner hereinbefore described for the purpose of performing bona fide through service in the movement of interstate traffic over logical and normal routes, provided the routes are not used to avoid State regulation, for reasons that its certificated authorities are not restricted against tacking, that the authority described in separate paragraphs of the carrier's original certificate was intended to enable the carrier to operate over any route or combination of routes from, to, and between authorized points, that the Commission approved the unification of rights in Sub-1 so as to enable Arrow to provide through service, and that the regular-route and irregular-route authority in Sub-3 may be combined so as to enable Arrow to transport traffic to and from points within 15 miles of Philadelphia.

The principal question remaining for determination is whether Hudson or Arrow, or both, in the transportation of traffic moving solely between Pennsylvania points are utilizing authorized routes or gateways in New Jersey as a subterfuge to avoid State regulation, or whether these routes are unduly circuitous or otherwise abnormal for use

in performing bona fide transportation in interstate commerce. Somewhat similar issues have been determined by the Commission in several cases; however, each case must be determined on the facts presented. In the *Service* case, the Commission found that the petitioner was lawfully tacking separate authorities at its headquarters in Bluefield, W. Va., for the purpose of transporting a small volume of traffic between points in Virginia, that petitioner's use of the described routes was not shown to be a subterfuge to avoid State regulation, that the routes employed were not unduly circuitous or impractical but on the contrary were such as might normally be used by any carrier authorized to operate between the involved Virginia points, and that Bluefield was the base of other substantial operations to and from points in Virginia of which the operations challenged were only a small part. In the *Dixie* case, the Commission found that the carrier was performing bona fide interstate operations by tacking irregular route authorities at Opelika, Ala., and performing through service on shipments of traffic from Atlanta, Ga., to Fort Benning, Ga., and that the carrier's use of the route via Oplika, which was about 28 miles less than the direct route, was not shown to be a subterfuge to avoid State regulation. In the *Atlantic* case, the Commission found that the carrier was performing bona fide interstate operations by tacking its regular-route authorities at Baltimore, Md., and transporting freight from Philadelphia to Pittsburgh, Pa., over a route which was about 33 miles longer than the direct route, and that the carriers use of the routes via Baltimore was not shown to be a subterfuge to avoid State regulation.

In several cases, the Commission has denied applications for unification of operating rights where it was

shown that the carriers traffic would be transported between States over unduly circuitous routes and out-of-the-way gateways. For example, in *Baggett Transp. Co.—Purchase—Dean*, 59 M.C.C. 8, the application was denied where it was shown among other things, (1) that the proposed route from Birmingham, Ala., to Atlanta, Ga., was 300 miles compared to a direct route of 167 miles, and (2) that the proposed route from Gadsen, Ala., to Atlanta was 365 miles compared to a direct route of 132 miles. In *Watson Bros. Transp. Co., Inc.—Pur—West Coast Fast Frt.*, 57 M.C.C. 745, the application was denied where it was shown, among other things, that the proposed route from San Francisco, Calif., to Denver, Colo., was about 30 percent longer than the direct route. In *Malone Freight Lines, Inc.—Lease—Safety Transp. Corp.*, 56 M.C.C. 571, the application was denied where it was shown that the proposed services would have been performed over uneconomical and circuitous routes. In *Joseph E. Faltin—Purchase—Clyde B. Gray*, 50 M.C.C. 364, the application was denied where it was shown that approval would, in most instances, sanction operations over routes which were excessively circuitous in comparison to direct routes. In addition, in the *Creston* case the Commission refused to remove a restriction against tacking which involved varying degrees of circuity.

There is no doubt that Hudson and Arrow are lawfully utilizing the routes via New Jersey points in the movement of the interline traffic mentioned above; however, the evidence is convincing that these carriers are using the routes via New Jersey points primarily as a subterfuge to avoid regulation by P.U.C., and that the transportation performed over these routes in the handling of the substantial volume of traffic which moves solely be-

tween the Pennsylvania points here involved, hereinafter called state freight, does not constitute bona fide transportation in interstate commerce. The record indicates that the movement of the state freight is a subterfuge to evade the jurisdiction of P.U.C., for the reasons (1) that the vehicles used by Hudson nightly to transport the state freight and other freight are not stopped to pickup or deliver any traffic at points in New Jersey, (2) that in the transportation of freight between Philadelphia, Allentown and Scranton, Hudson is performing regular-route service nightly, and its certificated authority is limited to irregular-route service, (4) that each carrier advertises direct service, and transports the state freight over circuitous routes, (5) that in the transportation of the state freight, the routes used by each carrier from Philadelphia to Allentown are excessively circuitous, and the routes used by each carrier from Philadelphia to Scranton are somewhat circuitous, compared to the direct intrastate routes which can be utilized more efficiently and economically by existing intrastate carriers in the movement of this traffic from Philadelphia to Allentown and Scranton. All things considered, the examiner concludes that Hudson and Arrow are engaged in unlawful transportation of Pennsylvania intrastate traffic over routes via New Jersey points, in violation of their interstate certificates, and as a subterfuge to avoid regulation by P.U.C., and that each carrier should be ordered to cease and desist from engaging in such unlawful operations.

FINDINGS

In No. MC-C-2671 and No. MC-C-2696, the examiner find (1) that the described operations by defendants between Philadelphia, Pa., and points in Pennsylvania via points in New Jersey in the transportation of property

which originates at a point in Pennsylvania and terminates at a point outside the State, and vice versa, are bona fide operations in interstate or foreign commerce, and authorized in their certificates in No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2, and 3), and (2) that defendants's transportation of property which originates at Philadelphia, Pa., and terminates at other points in Pennsylvania, and vice versa, was and is not authorized in their certificates; that defendants have engaged in the transportation of the traffic described in (2) above without proper authority and in violation of section 206(a)(1) of the Act; and that an order should be entered requiring each defendant to cease and desist, and hereafter to refrain and abstain from all operations of the character found in this report to be unlawful.

In No. MC-113933, No. MC-71536, and No. MC-71536 (Sub-Nos. 1, 2 and 3), the examiner finds that the matters to which the petitions are directed have been disposed of in the findings in No. MC-C-2671 and No. MC-C-2696 above, and that in view of the findings, and the cease and desist order to be entered in the complaint proceedings, the petitions should be denied.

An appropriate order will be entered.

By H. L. Hanback, Hearing Examiner.

(Signature) H. L. Hanback

APPENDIX A

Certificate No. MC-71536

Between New York, N. Y., and points in Pennsylvania, as follows:

(G)—From New York over irregular routes to Paterson, N. J., thence over U. S. Highway 46 to Hackettstown, N. J., thence over New Jersey Highway 24 to Phillipsburg, N. J., thence over U. S. Highway 22 via Easton, Pa., to Allentown, Pa., thence over U. S. Highway 309 to junction Pennsylvania Highway 29 thence over Pennsylvania Highway 29 via Hazleton, Pa., to junction Pennsylvania Highway 93, thence over Pennsylvania Highway 93 to Berwick, Pa., thence over U. S. Highway 11 via Danville, Pa., to Northumberland, Pa.

(F)—From New York as specified above to Allentown, Pa., thence over U. S. Highway 22 to Hamburg, Pa., thence over U. S. Highway 122 to Sunbury, Pa., thence over Pennsylvania Highway 14 to Williamsport, Pa., and thence over U. S. Highway 220 to Lock Haven, Pa.;

From New York as specified above to Danville, Pa., thence over Pennsylvania Highway 54 to Elysburg, Pa., and thence over Pennsylvania Highway 242 to Paxinos, Pa.

(E-2)—From New York as specified above to Hackettstown, N. J., thence over U. S. Highway 46 to Portland, Pa., thence over U. S. Highway 611 to Scranton, Pa., and thence over U. S. Highway 11 to Berwick, Pa.:

From New York as specified above to Scranton, Pa., and thence over U. S. Highway 6 to Carbondale, Pa., and thence over Pennsylvania Highway 70 to Forest City, Pa.

(E-1)—From New York as specified above to Easton, Pa., thence over U. S. Highway 611 to Stroudsburg, Pa., thence over U. S. Highway 209 to junction Pennsylvania Highway 115, and thence over Pennsylvania Highway 115 to Kingston, Pa.;

From New York as specified above to Allentown, Pa., and thence over U. S. Highway 309 to Wilkes-Barre, Pa.;

From New York as specified above to Allentown, Pa., thence over U. S. Highway 309 to junction Pennsylvania Highway 563, thence over Pennsylvania Highway 563 to junction unnumbered highway, thence over unnumbered Highway to Red Hill, Pa., thence over Pennsylvania Highway 29 to Hereford, Pa., thence over Pennsylvania Highway 100 via Pottstown, Pa., to junction Pennsylvania Highway 83, thence over Pennsylvania Highway 83 to junction Pennsylvania Highway 683, and thence over Pennsylvania Highway 683 to Spring City, Pa.;

From New York as specified above to Allentown, Pa., and thence over U. S. Highway 222 to Ephrata, Pa., and

Return over the above-specified regular routes to Paterson, N. J., thence over irregular routes to New York.

(H)—Service is authorized to and from all intermediate points on the above-specified routes, and to and from the off-route points of Boonton, Belvidere, and Oxford, N. J., Nuremberg, Sheppton, Mifflinberg, Middleburg, Bearbortown, White Haven, Perkasie, Stowe, Gilbertville, Topton, Fleetwood, West Reading, Sinking Spring, Denver and Mahton, Pa. those in New Jersey within 35 miles of Columbus Circle, New York,

N. Y., and those within ten miles of each of the following points: Phillipsburg, Allentown, Danville, Forty Fort, Hazleton, Scranton, Shamokin, Stroudsburg, Sunbury, and Williamsport, Pa.

Certificate No. MC-71536 (Sub-No. 1)

(D)—Between Easton, Pa., and Wernersville, Pa.:

From Easton over U. S. Highway 22 to Allentown, Pa., thence over U. S. Highway 222 to Reading, Pa., thence over U. S. Highway 422 to Wernersville, Pa., and return over the same route:

Service is authorized to and from the off-route points of Emmaus, Macungie, Topton, Fleetwood, Hamburg, Hellertown, and Pottstown, Pa.

(E)—Between Allentown, Pa., and Scranton, Pa., as follows:

From Allentown over U. S. Highway 309 via Mauch Chunk, Pa., to Hazleton, Pa. (also from Mauch Chunk over U. S. Highway 209 to Tamaqua, Pa., thence over Pennsylvania Highway 29 to Hazleton), thence over U. S. Highway 309 to Pittston, Pa., and thence over U. S. Highway 11 to Scranton:

From Allentown over U. S. Highway 22 to Bethlehem, Pa., thence over unnumbered highway to Bath, Pa., thence over Pennsylvania Highway 45 to Nazareth, Pa., thence over Pennsylvania Highway 12 to Wind Gap, Pa., thence over Pennsylvania Highway 702 to Bangor, Pa., thence over Pennsylvania Highway 712 to junction U. S. Highway 611, and thence over U. S. Highway 611 to Scranton; and

Return over these routes to Allentown.

Service is authorized to and from the off-route points of Summithill, Mt. Carmel, Pottsville, Schuylkill Haven, Orwigsburg, Ashland, Shenandoah, Girardville, Frackville, Port Carbon, Mahoney City, Duryea, Olyphant, Taylor, Luzerne, Old Forge, Plymouth, Kingston, West Pittston, Freeland, Centralia, St. Clair, New Philadelphia, and Throop, Pa.

(C-1)—Between Allentown, Pa., and Morrisville, Pa., as follows:

From Allentown over U. S. Highway 309 to Quakertown, Pa., thence over Pennsylvania Highway 313 to junction Pennsylvania Highway 113, thence over Pennsylvania Highway 113 to Doylestown, Pa., thence over U. S. Highway 202 to New Hope, Pa., and thence over Pennsylvania Highway 32 to Morrisville:

From Allentown over U. S. Highway 309 to Sellersville, Pa., thence over Pennsylvania Highway 813 via Telford, Pa., to junction Pennsylvania Highway 63, thence over Pennsylvania Highway 63 via Hatfield, and Lansdale, Pa., to junction U. S. Highway 202, thence over U. S. Highway 202 to Buckingham, Pa., thence over Pennsylvania Highway 113 to Newtown, Pa., thence over Pennsylvania Highway 532 to Yardley, Pa., and thence over Pennsylvania Highway 32 to Morrisville: and

Return over these routes to Allentown.

Service is authorized to and from the off-route point of Silverdale, Pa.

Between Pennsylvania points and points in New Jersey as follows:

From Easton, Pa., over unnumbered highways via Phillipsburg, Alpha, Warren Glen and Spring Mills, N. J., to Milford, N. J.

From Portland, Pa., across the Delaware River to junction New Jersey Highway 8, thence over New Jersey Highway 8 to Columbia, N. J.;

From New Hope, Pa., over U. S. Highway 202 to Lambertville, N. J., thence over unnumbered highway via Titusville, N. J., to Trenton, N. J.

(B-1)—From Morrisville, Pa., over U. S. Highway 1 to Trenton, N. J., thence over numbered highway via Titusville, N. J., to Lambertville, N. J.

(C)—From Easton, Pa., over U. S. Highway 22 via Phillipsburg, Clinton, and Clinton Corners, N. J., to Plainfield, N. J.;

From Easton across the Delaware River to junction New Jersey Highway 24, thence over New Jersey Highway 24 to junction New Jersey Highway S24, thence over New Jersey Highway S24 to Hackettstown, N. J., and thence over U. S. Highway 46 to Netcong, N. J.; and

Return over these routes to the above-specified Pennsylvania origin points.

(B)—Between Clinton, N. J., and Trenton, N. J.:

From Clinton over U. S. Highway 22 to junction New Jersey Highway 69, thence over New Jersey Highway 69 to Trenton, and return over the same route.

Between Scranton, Pa., and Endicott, N. Y.:

From Scranton over U. S. Highway 11 to Binghamton, N. Y., thence over New York Highway 17C to Endicott, and return over the same route.

Service is authorized to and from all intermediate points on the above-specified routes.

Certificate No. MC-71536 (Sub-No. 3)

Regular Route:

(A)—*General commodities,* except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Philadelphia, Pa., and New York, N. Y., serving all intermediate points:

From Philadelphia over U. S. Highway 1 to Newark, N. J., and thence over city streets and connecting highways to New York, and return over the same route.

Irregular Routes:

(A-1)—General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Philadelphia, Pa., on the one hand, and on the other, points within 15 miles of Philadelphia, Pa.

Recommended by H. L. Hanback,
Hearing Examiner
(Signature) H. L. Hanback

ORDER

At a Session of the Interstate Commerce Commission, Division 1, held at its office in Washington, D. C., on the day of A. D. 1960.

No. MC-C-2671

Pennsylvania Public Utility Commission

v.

Hudson Transportation Company

No. MC-C-2696

Pennsylvania Public Utility Commission

v.

Arrow Carrier Corporation

No. MC-113933

Hudson Transportation Company—
Petition for Declaratory Order

No. MC-71536

Arrow Carrier Corporation—
Petition for Declaratory Order

No. MC-71536 (Sub-No. 1)

Arrow Carrier Corporation—
Petition for Declaratory Order

No. MC-71536 (Sub-No. 2)

Arrow Carrier Corporation—
Petition for Declaratory Order

No. MC-71536 (Sub-No. 3)

Arrow Carrier Corporation—
Petition for Declaratory Order

Investigation of the matters and things involved in these proceedings having been made, said complaints and petitions upon due notice having been heard by the exam-

iner who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceedings having been duly submitted:

It is ordered, That defendants in No. MC-C-2671, and No. MC-C-2696 be, and they are hereby, notified and required within 30 days from the date this order becomes effective pursuant to the provisions of Section 17(5) of the Interstate Commerce Act, to cease and desist, and thereafter to refrain and abstain from the performance of transportation of the character found in said report to be unlawful.

It is further ordered, That the said petitions in Nos. MC-113933, MC-71536, and MC-71536 (Sub-Nos. 1, 2 and 3) be, and they are hereby, denied.

And it is further ordered, That this order shall become effective on

By the Commission, division 1.

Harold D. McCoy,
Secretary

(Seal)

APPENDIX B

INTERSTATE COMMERCE COMMISSION

No. MC-C-2671 [1]

PENNSYLVANIA PUBLIC UTILITY COMMISSION

v.

HUDSON TRANSPORTATION COMPANY

Decided November 30, 1960

1. In Nos. MC-C-2671 and MC-C-2696, defendants found to be performing both authorized transportation and transportation of intrastate freight between points in Pennsylvania through points in New Jersey. Complaints dismissed.

2. In Nos. MC-113933, MC-71536, and MC-71536 (Sub-Nos. 1, 2 and 3), petitioners found to be performing both authorized transportation and transportation of intrastate freight between points in Pennsylvania through points in New Jersey. Petitions granted in part.

William A. Goichman for complainant in No. MC-C-2671 and No. MC-C-2696, and intervener in opposition to

[1] This report also embraces No. MC-C-2696, Pennsylvania Public Utility Commission v. Arrow Carrier Corporation; No. MC-113933, Hudson Transportation Company—Petition for Declaratory Order; and Nos. MC-71536, MC-71536 (Sub-Nos. 1, 2 and 3), Arrow Carrier Corporation—Petition for Declaratory Order.

the petitioners in Nos. MC-113933, and MC-71536 and MC-71536 (Sub-Nos. 1, 2 and 3).

Richard V. Zug and *August W. Heckman* for petitioner in No. MC-113933, and defendant in No. MC-C-2671.

Christian V. Graf, Spencer R. Liverant and *Robert J. Stewart* for petitioner in No. MC-71536 and No. MC-71536 (Sub-Nos. 1, 2 and 3), and intervener in support of petitioner in No. MC-113933.

Edwin A. Gehring for intervener in support of petitioner in No. MC-113933, and in opposition to other petitioner.

Paul F. Barnes for interveners in support of complainants and in opposition to the petitioners.

Ernie Adamson for intervener in support of defendants.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS MURPHY, GOFF AND HERRING

BY DIVISION 1:

These proceedings involve related issues, were heard on a consolidated record, were the subject of a single report and recommended order by the examiner, and will be disposed of here in one report. Our conclusions differ in part from those recommended. Separate exceptions to the order recommended by the examiner were filed by Hudson Transportation Company, hereinafter sometimes called Hudson, and by Arrow Carrier Corporation, hereinafter sometimes called Arrow. Replies were filed in all of the proceedings by the Pennsylvania Public Utility Commission, hereinafter sometimes called P.U.C., and by Highway

Express Lines, Inc., Rodgers Motor Lines, Inc., Fowler and Williams, Inc., and Modern Transfer Co., Inc., hereinafter called Highway Express, Rodgers, Fowler, and Modern, respectively.

In No. MC-C-2671, by complaint filed August 24, 1959, and in No. MC-C-2696, by complaint filed October 8, 1959, P.U.C. alleges in essence, that Hudson and Arrow, respectively, (1) are motor carriers holding certain authorities issued by the Interstate Commerce Commission, and, as such, are subject to the provisions of the Interstate Commerce Act, and (2) have transported property by motor vehicle between certain points in the State of Pennsylvania, over routes through points in the State of New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the Interstate Commerce Commission, as required by sections 203(c) and 206(1) of the Interstate Commerce Act, or having obtained a certificate from P.U.C., as required by sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania. Complainant prays that the Commission issue an order requiring each defendant to cease and desist from the alleged violations. Answers to the complainants were filed by defendants in the respective proceedings.

By petition dated October 23, 1958, in No. MC-113933, and by petition filed August 31, 1959, in Nos. MC-71536 and MC-71536 (Sub-Nos. 1, 2 and 3), Hudson and Arrow, respectively, request orders interpreting their outstanding certificates, or, in the alternative, request that the Commission enter declaratory orders finding as to each petitioner (1) that its certificates do not limit it to the transportation of shipments moving between points in Pennsylvania, on the one hand, and, on the other, points in other (specified) States, and (2) that under its certifi-

cates it may conduct interstate operations between points in Pennsylvania through a New Jersey gateway pursuant to the authority described in its certificates and may interchange or interline shipments moving from or to points in Pennsylvania beyond the territorial scope of its authorities with connecting interstate carriers, so long as it actually moves such traffic through New Jersey.

Motor Freight Express, hereinafter called Motor Freight, was permitted to intervene in support of the complaint in No. MC-C-2696, and in opposition to both petitions; Fowler, Modern, Rodgers, and Highway Express were permitted to intervene in support of both complaints and in opposition to both petitions; Arrow and Hudson were permitted to intervene in support of each other's petition; P.U.C., was permitted to intervene in opposition to both petitions; and the W. J. Dillner Transfer Company was permitted to intervene as its interests may appear.[2]

The facts here are not materially in dispute. The complaint in the title proceeding alleges, and Hudson admits, that from January 10, 1958, to August 29, 1958, approximately 59 shipments were transported by Hudson from Philadelphia, Pa., to points in Pennsylvania within 40 miles of Stroudsburg, Pa., including Scranton and Allentown, Pa., and one shipment each from Scranton, Wilkes-Barre, West Pittston, West Wyoming, and Kingston, Pa., to Philadelphia. All of these shipments moved to some extent over highways in New Jersey. Hudson also transported five shipments from and to Philadelphia and Scranton through points in New Jersey. As an example, one of

[2] The W. J. Dillner Transfer Company subsequently adopted by letter the position taken in the separate exceptions of Arrow and Hudson.

these shipments moved from Philadelphia over the Tacony-Palmyra Bridge and New Jersey Highway 73 to junction U. S. Highway 130, thence over U. S. Highways 130 and 206 to Trenton, N. J., thence over U. S. Highway 69 to junction U. S. Highway 46, thence over U. S. Highway 46 to junction U. S. Highway 611, and thence over U. S. Highway 611 to Hudson's terminal in Scranton. On the above route, comprising a distance of 160 miles, no stops were made to pick up or deliver freight, and the driving time was 5 hours and 10 minutes. By a slightly different routing used by Hudson for some of the other challenged hauls, its equipment moved from Philadelphia through New Jersey points to Allentown, a distance of 106 miles, and thence to Scranton, for a total mileage of 185. Similarly, no stops were made en route for pickup or delivery of freight.

The complaint in No. MC-C-2696 alleges, and Arrow admits, that from July 31, 1958, to August 23, 1958, defendant therein transported a total of 10 shipments from Scranton, Bangor, Allentown, Shamokin, Wilkes-Barre, and Swoyersville, Pa., to Philadelphia, and a total of seven shipments from the latter point to Catasauqua, Muncy, Shamokin, White Haven, and Scranton, Pa. All of the above shipments moved to some extent over routes in New Jersey. The distance between Arrow's terminals in Philadelphia and Allentown, over U. S. Highway 309 in Pennsylvania, is 52.4 miles and requires approximately 1 hour and 50 minutes driving time, while the distance between the same terminals, over the Pennsylvania Turnpike Extension, is 71 miles, requiring approximately 2 hours driving time.

Modern holds P.U.C. intrastate authority to transport general freight between Philadelphia and Allentown over U. S. 309, which it avers to be the shortest and most direct

route between those points. The time required to cover the above-described route, clocking 52 miles, is said to be approximately 2 hours.

Highway Express holds Pennsylvania intrastate authority between Philadelphia and Scranton. It transports general freight from Philadelphia over unspecified routes to King of Prussia, Pa., thence over U. S. Highway 202 to junction U. S. Highway 309, thence over U. S. Highway 309 to Central Valley, Pa., thence over Pennsylvania Highway 12 to Bethlehem, Pa., thence over Pennsylvania Highways 512 and 12 to Bartonsville, Pa., and thence over U. S. Highway 611 to Scranton. This route is approximately 130 miles, requiring about 4 hours and 20 minutes driving time, and is alleged by Highway Express to be the most direct and shortest route between Philadelphia and Scranton.

Hudson, of Jersey City, N. J., is a motor common carrier holding authority from this Commission in No. MC-113933. This certificate embodies authority purchased from one Joseph Kowaski, who held No. MC-105946, which, in turn, encompassed two certificates purchased by him. As here pertinent, the first of these two certificates purchased by Kowaski authorized the transportation of general commodities, with exceptions, over irregular routes, between Stroudsburg, Pa., and points within 40 miles thereof, on the one hand, and, on the other, New York, N. Y., and points in Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Somerset, Sussex, Union, and Warren Counties, N. J. The second certificate superseded by No. MC-105946 authorized the transportation of general commodities, with exceptions, over irregular routes, between Philadelphia, on the one hand, and, on the other, points in Warren, Sussex, Morris, and Somerset Counties, N. J. The above-described authority appears in two separate paragraphs in No. MC-

113933, and has been tacked at points in Warren County since October 1956 to provide a basis for Hudson's nightly service between Philadelphia, on the one hand, and, on the other, points in Pennsylvania within 40 miles of Stroudsburg. The routes traveled by Hudson in the performance of such service are: from Philadelphia across the Tacony-Palmyra Bridge and over New Jersey Highway 73 to junction U. S. Highway 130, thence over U. S. Highway 130 to junction U. S. Highway 206, thence over U. S. Highway 206 to Trenton, thence over New Jersey Highway 69; thence (1) to junction U. S. Highway 46, thence over U. S. Highway 46 to junction U. S. Highway 611, and thence over U. S. Highway 611, through Stroudsburg, to Scranton, or (2) to junction U. S. Highway 22 at Clinton Corners, N. J., and thence over U. S. Highway 22 through Phillipsburg, N. J., to Allentown, or (3) the same as (2), thence from Allentown over Pennsylvania Highways 987, 512, and 12 to Bartonsville, Pa., and thence over U. S. Highway 611 to Scranton, and return over the same routes. Over the routes described in (1) and (2) above the distance between Hudson's terminals in Philadelphia and those in Scranton and Allentown is approximately 160 and 106 miles, respectively, and the related required driving time is 5.1 and 3.5 hours, respectively. Traffic routed between Philadelphia and Scranton by (3) in combination with (2) above traverses approximately 184 miles and requires about 5.1 hours driving time. For the first six months of 1959 Hudson received gross revenue from all operations of $593,000. This revenue includes approximately $51,000 realized from traffic transported from Philadelphia to other Pennsylvania points over routes in New Jersey. Hudson's vehicles performing the challenged operations carry both freight originating and terminating at Pennsylvania points and freight which is interchanged

with other carriers for through transportation from, to, or between points without Pennsylvania. Driver's logs are kept, and compliance with the Commission's safety regulations made, on all such movements. The subject traffic is solicited by Hudson freight agents in Pennsylvania and by telephone directory advertisements noting "direct" service by Hudson between Philadelphia and other Pennsylvania points. Similarly, Hudson alleges direct service in certain tariff and other publications. Hudson's vice-president states that in the absence of any regulation whatsoever, Hudson would utilize the more direct Pennsylvania Turnpike Extension between Philadelphia and Scranton rather than the routes described above.

Arrow, of Carlstadt, N. J., is a motor common carrier authorized to transport general commodities, with exceptions. As here pertinent it holds authority in No. MC-71536, issued in 1942 in a proceeding arising under the 1935 "grandfather" provisions, and Nos. MC-71536 (Sub-No. 1), and MC-71536 (Sub-No. 3), which it acquired by purchase. They are hereinafter called the original certificate, Sub-No. 1, and Sub-No. 3, respectively, and are more fully set forth in the appendix hereto. It also holds Pennsylvania intrastate authority and No. MC-71536 (Sub-No. 2), which are not involved here. By tacking segments of the original, Sub-No. 1, and Sub-No. 3 certificates, Arrow has performed the challenged transportation, and, for clarity of discussion, the pertinent segments so joined have been alphabetically and numerically designated by precedent brackets in the appendix. Since May 1957 Arrow has been performing a daily round trip service on freight originating, terminating, or interchanged at Philadelphia by routing its vehicles over the Tacony-Palmyra Bridge and over New Jersey Highway 73 to junction U. S. High-

way 130, thence over U. S. Highways 130 and 206 to Trenton under irregular route authority described in (A-1) of Sub-No. 3, thence over New Jersey Highway 69 to junction U. S. Highway 22 at Clinton Corners under regular route authority described in (B) of Sub-No. 1, thence over U. S. Highway 22 through Phillipsburg to Easton, Pa., under regular route authority described in (C) of Sub-No. 1, and thence over U. S. Highway 22 to Allentown under regular route authority described in (D) of Sub-No. 1 or (G) of the original certificate. A stop is made at Phillipsburg to unload freight terminating at local points, including Bangor, Pa. Freight destined to points beyond Allentown proceeds in an Arrow vehicle making a scheduled trip from Carlstadt, N. J., to points in Pennsylvania either under regular route authority described in the original or in the Sub-No. 1 certificate. If, for instance, it wishes to continue to Scranton, the distance from Philadelphia thereto would be about 160 miles. Since April 1959, U. S. Highway 1 has been utilized by Arrow between Philadelphia and Trenton under regular route authority described in (A) of Sub-No. 3. The distance between Arrow's Philadelphia and Allentown terminals over the routes described above is approximately 110 miles and requires about 3.5 hours driving time. The distance between the same two points over U. S. Highway 309 is approximately 57 miles. Arrow points out that it is also able to continue over an alternate route from Allentown to Scranton by tacking other segments of its authority at Allentown. The highway distance thus traveled between Philadelphia and Scranton is approximately 185 miles. As of October 1959, Arrow was moving the considered freight at a frequency of four northbound, and two or three southbound, 20,000 pound loads a night. Arrow maintains terminals at Carlstadt and Phillipsburg, N. J., and Allentown, Schuylkill Haven,

Shamokin, Williamsport, Scranton, and Hazleton, Pa., all of which points are involved in the challenged service. It solicits the subject traffic and holds out "direct" service therefor in notices appearing in telephone directories, newspapers, and certain tariff publications. Arrow's president stated that absent all regulation of transportation, that carrier probably would utilize the more direct Pennsylvania Turnpike Extension between Philadelphia and Scranton rather than the routes described above.

EXCEPTIONS AND REPLIES

The examiner found the challenged tacking of authority by Hudson and by Arrow to be lawful, but that the use of such tacked routes by defendants to transport freight moving solely between Pennsylvania points is a subterfuge to avoid the jurisdiction of, and resulting regulation by, P.U.C., and is therefore unlawful. He recommended, in the complaint proceeding, that the defendants be ordered to cease and desist from such transportation; and, in the other proceedings, that the petitions filed by Hudson and Arrow seeking a contrary interpretation of their certificates, or other relief, be denied.

In separately filed exceptions, Hudson and Arrow, collectively, urge the dismissal of the complaints and the issuance of the declaratory orders requested in their petition proceedings. Hudson contends that the examiner's recommended order is void due to his alleged failure to support his conclusions by reference to specific facts, citing *United States v. B. & O. Ry. Co.*, 293 U.S. 454; and that it may lawfully tack its authority at a point without Pennsylvania to perform service between points in Pennsylvania, citing, among other cases, *Atlantic Freight Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175; *Service,*

Storage & Transfer Co., Inc.—Petition for Declaratory Order, 71 M.C.C. 304, and claiming substantive affirmation thereof in *Service, Storage & Transfer Co. v. Commonwealth of Virginia*, 359 U.S. 171, hereinafter sometimes called the *Service Petition* and *Service* case, respectively; and *Jones Motor Company, Inc. v. Pennsylvania Public Utility Commission*, 361 U.S. 11, 361 U.S. 904. Arrow, in its exceptions, argues (a) that since its above-noted advertisements of "direct" service mean, in transportation parlance, single-line service, the examiner improperly inferred a subterfuge solely from the "circuitous" mileage traversed by Arrow in performing the complained-of transportation between Pennsylvania points; (b) that the examiner incorrectly considered the Supreme Court's action in the *Service* case, *supra*, as being a reversal of the lower court upon procedural grounds, pointing out (1) that the decision appealed from therein was penal in nature, and (2) that the Court, in discussing the proceeding on its merits, commented upon the absence of direct evidence of bad faith on the part of the defendant; (c) that, contrary to the examiner's findings, the proceedings in the *Jones* case, *supra*, may be viewed as approval of the lawfulness of Arrow's challenged activities; (d) that the cases[3] relied upon by the examiner to support his conclusion that the circuitous routes employed by Arrow between the involved Pennsylvania points are a subterfuge to the jurisdiction of P.U.C. are proceedings wherein additional authority was sought to be combined with existing authority, and may thereby be distinguished from the instant

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[3] *Baggett Transp. Co.—Purchase—Dean*, 59 M.C.C. 8; *Watson Bros. Transp. Co., Inc.—Pur.—West Coast Fast Freight*, 57 M.C.C. 745; and *Malone Freight Lines, Inc.—Lease—Safety Transp. Corporation*, 56 M.C.C. 571

proceeding; and (c) that its challenged tacking is in all respects lawful under the doctrine set forth in *Aetna Freight Lines, Inc., Interpretation of Certificate*, 48 M.C.C. 610, and other cases.

In reply to Hudson's exceptions, P.U.C. contends that the examiner's recommendation and finding of subterfuge is amply supported by specific findings of fact; is not adverse to the *Service* case, *supra;* and, accordingly, should be sustained. In reply to Arrow's exceptions, P.U.C. argues to the same effect, and, in addition, emphasizes that the Supreme Court, in the *Service* case, acted upon jurisdictional grounds, and the Court's discussion of the facts involved was by way of *obiter dicta*; that if a carrier's use of its authorized route should be other than a logical and normal operation; it would be in bad faith, citing the *Service Petition, supra*, and *Eicholz v. P.S.C. of Mo.*, 306 U.S. 268, and that this test supports the examiner's findings; that the "industrious solicitation" of intrastate traffic and the volume thereof transported are factors to properly be considered in a proceeding of this nature; and that the Commission has consistently refused to sanction the tacking of authority which would result in circuitous routes. In their joint reply to both exceptions, Fowler, Rodgers, Highway Express, and Modern adopt and supplement both replies of P.U.C. They point out that the *Jones* case, *supra*, was reversed by the Supreme Court, Per Curiam, solely on the authority of the *Service* case, and assert that affirmation was thereby given to the procedural reversal of the latter proceeding. These replicants further aver that the petitions of both Hudson and Arrow must be denied on the strength of the language in the *Atlantic Freight Petition, supra*,[4] to the effect that

[4] Cited by Hudson on exceptions.

such petitions are not within the scope of the relief afforded under section 5(d) of the Administrative Procedure Act; that the Interstate Commerce Commission should decline to render an informal opinion on the questions involved; and that an informal opinion such as that expressed in the above-cited *Atlantic Freight Petition* is entitled to no weight here.

The evidence adduced, the examiner's recommendation, the exceptions, and the replies thereto have been considered. We find the examiner's statement of fact to be adequate for determination of the issues involved; and, as hereinabove supplemented, adopt it as our own. We have considered Hudson's allegation that the conclusions expressed in the examiner's report were unsubstantiated by proper factual reference and, without reproducing the report or the factual references here, find such contention to be without merit.

DISCUSSION AND CONCLUSIONS

Consideration of the *Service* and *Jones* cases, *supra*, is essential to the disposition of the matters before us. In the *Service* case, the Virginia Court of Appeals modified a fine imposed by the Virginia State Corporation Commission upon defendant Service Storage & Transfer & Storage Co., a motor common carrier holding authority from the Interstate Commerce Commission, but no authority from Virginia. In brief, defendant therein had been transporting freight between certain Virginia points through the gateway of Bluefield, W. Va., by tacking, at the latter point, certain authority issued by this Commission. These activities were alleged by Virginia to have been of an intrastate character and, therefore, in violation of the Code of Virginia. The Supreme Court reviewed the facts, not-

ing that the certificate containing the tacked authority encompassed both defendant's original certificate and one subsequently purchased by it; that defendant's headquarters was in Bluefield; that the challenged traffic was used to fill out less-than-truckload shipments and constituted three percent of defendant's total traffic; and that there was no evidence of bad faith on the part of defendant. The Court concluded its factual recitation by stating that defendant's "certificate on its face covers the whole operation". It reversed the Virginia Court of Appeals, stating:[5]

> . . . It appears clear that interpretations of Federal certificates of this character should be made in the first instance by the authority issuing the certificate . . . Compare Atlantic Freight Lines, Inc. v. Pennsylvania Public Utility Commission, 163 Pa. Super. 215, 60 A. 2d 589, with Atlantic Freight Lines, Inc.—Petition for Declaratory Order, 51 M.C.C. 175[6] . . . The wisdom of such a practice is highlighted by the facts of this case[7] . . . . Such conflicts can best be avoided if the interpretation of I.C.C. certificates is left to the Interstate Commerce Commission. . . .

The Court then distinguished the *Eicholz* case, *supra*, as one wherein the defendant carrier crossed a State line for

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[5] 359 U.S. at 177.

[6] These proceedings presented the same facts, but resulted in opposite conclusions.

[7] Between the close of the hearing before the Virginia State Corporation Commission and the announcement by that body of its decision therein, defendant petitioned this Commission for a declaratory order interpreting its certificate. The Commonwealth of Virginia and this Commission ultimately reached opposite conclusions as to the transportation that could be performed under that certificate.

the sole purpose of creating an interstate operation, and one wherein a State took punitive action in circumstances where the carrier had not submitted its operations to the regulation of the Interstate Commerce Commission at the time of the alleged violations. The Court continued:[8]

> . . . Finally, the Commonwealth is not helpless to act . . . it can avail itself of the remedy Congress has provided in the [Interstate Commerce] Act. . . .

Clearly, the Court intended its opinion to have the effect of placing before this Commission, as the primary forum, those questions arising under our certificates. In our opinion, the Court's factual discussion is intended to show that the challenged operation was, on its face, within the scope of the interstate certificate, and thus determination of the validity of the operation in question was within our jurisdiction. We are satisfied that no other issue but that of jurisdiction was dealt with by the court in the *Service* case. Accordingly, we do not regard it as a decision on the merits of the issues under consideration here. It follows, then, that the *Jones* case, *supra*, involving an operation comparable to those complained of in the *Service* case, and reversed, Per Curiam, by the Supreme Court on the strength of the *Service* case, is similarly of jurisdictional import.

Hudson, which holds irregular route authority, has been using consistently a fixed route, as described above, in the performance of the considered transportation, and there is a marked regularity in the service thus provided between certain fixed termini. Although the record is not sufficiently illuminative as to other criteria described in *Transportation Activities, Brady Transfer & Storage Co.*,

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[8] 359 U.S. at 179.

47 M.C.C. 23, for us to determine whether Hudson is conducting a regular-route service under its irregular-route authority, we herein admonish Hudson of the necessity of maintaining the distinction between regular- and irregular-route service as set forth in the *Brady* case.

We are in agreement with the examiner that the joinder by Hudson and Arrow, respectively, of the authority resulting in the subject operations does not, in and of itself, appear to violate any established principles with respect to tacking. Defendants urge that once having reached this conclusion, we need look no further to find, on the strength of the *Aetna* case, *supra*, that the operations thus performed are, in all respects, proper. Although the latter proceeding provides a basic rule under which the permissiveness of tacking may be judged, its doctrine by no means contemplates a determination of all of the issues under consideration here, nor precludes a finding that authority may, when properly joined, be used to achieve an end not contemplated by the issuance of our certificates. The principal question presented here is whether Hudson and Arrow may each, under its certificates issued by us, perform transportation from and to points in Pennsylvania by tacking at a point, or points, outside Pennsylvania.

While section 203(a)(10) of the act defines as being in interstate commerce, commerce between points in the same State through another State, section 202(b) of the act emphasizes that the right to regulate *intrastate* commerce on its own highways remains in the States. The *Eicholz* case, *supra*, made it clear that an attempted subterfuge to evade the jurisdiction of a State to regulate intrastate commerce might be inferred from a carrier's unreasonable interstate routing. Later, in the *Atlantic*

Freight Petition, supra, former division 5 said, in informally discussing an interstate operation conducted pursuant to our certificate, which certificate specified a route between points in Pennsylvania through Baltimore, Md., that the fact that such route contemplates no subterfuge to evade State jurisdiction, but is bona fide interstate commerce, is a condition precedent to the issuance of the certificate, and that the certificate therefore cannot be collaterally attacked.[9] It is true that the respective rights tacked by defendants in the performance of the operations challenged here were issued by this Commission. And, as pointed out in the *Atlantic Freight Petition,* our certificates authorize operation in interstate commerce. But that is not to say that all transportation performed pursuant to the technicalities appurtenant to such certificates is *ipso facto,* interstate transportation. It is obviously possible for authority to be conceived for the transportation of bona fide interstate traffic and thereafter abortively to be used to render service on intrastate traffic.

We need not dwell long on the particular facts here to conclude that, on the strength of precedents too voluminous to cite, transportation, by carriers under operating rights issued by this Commission, of that freight which is in continuous movement from, or to, points beyond Pennsylvania, regardless of the manner in which it is routed between the Pennsylvania points, can in no way impinge upon the State's regulatory power which is protested by section 202(b) of the act.

That the concept of interstate commerce embraces a movement between points in one State through another State is undisputed. But transportation performed in

[9] 51 M.C.C. 190.

such an operation must not be in bad faith to escape the proper jurisdiction of the terminal State. See, for example, *Eicholz, supra.*[10] This Commission, in an application proceeding wherein the applicant sought authority between points in Kansas through streets in Missouri, issued a certificate after finding the proposed route to be *necessary* to proper service. *Morse Common Carrier Application*, 22 M.C.C. 169. See also, *Eastern Carrier Corp., Common Carrier Application*, 14 M.C.C. 430. No indication appears that the proposed operation in *Morse* was in bad faith to escape the jurisdiction of Kansas. In the *Eastern Carrier* case, however, a portion of the "grandfather" authority sought was denied upon evidence that the operations upon which it was predicated involved deliberate routing of traffic through a second State in order to evade the jurisdiction of Pennsylvania. Compare *Cornell Steamboat Company v. United States*, 321 U.S. 634. Similarly, the *Atlantic Freight Petition, supra*, the *Service Storage Petition, supra*, and *Dixie Freight Lines, Inc., Common Carrier Application*, 24 M.C.C. 780, cited by both Hudson and Arrow in support of the bona fides of their respective operations, can be distinguished from the instant proceeding in that they did not find "bad faith" interstate operations.

Circuitous routing, between points in a State through another State, in and of itself, is not conclusive evidence

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[10] If appellant's hauling of the merchandise in question across the state line was not in good faith but was a mere subterfuge to evade the State's requirement as to intrastate commerce, there is no ground for saying that the prohibition of the use of the interstate permit to cover such transaction, and the application of the (Missouri) Commission's rule prohibiting them in the absence of an intrastate certificate, was an unwarrantable intrusion into the Federal field . . . 306 U.S. at 274.

of a "bad faith" interstate operation. But other factors may exist which, when coupled with circuity, warrant a different conclusion. In the proceedings before us the interstate routes utilized by Hudson and Arrow are longer, between the various concerned Pennsylvania points, than are existing all-Pennsylvania routes which are normally used by intrastate carriers. Transporting traffic over the interstate routes, therefore, involves circuitous routing. Here for example, the distance between Arrow's Philadelphia terminal and its Allentown terminal, over its interstate route hereinabove described, is approximately 110 miles. The comparable distance over more direct routes entirely in Pennsylvania, between Philadelphia and Allentown, is approximately 52 miles. Officers of both Hudson and Arrow admit that, absent any regulation of the challenged transportation, shorter or more geographically direct routes would be employed by each in transporting freight from Philadelphia to, for example, Scranton.

No logical reason appears for the present routing of the intrastate freight other than the fact that defendants are without intrastate authority to ransport it; and from the record, it fairly appears that the only reason for such routing is so that Hudson and Arrow may participate in intrastate traffic purportedly under rights arising from certificates issued by this Commission. All things considered, we are convinced that both Hudson and Arrow have, in their respective operations hereinabove described, by which they have transported freight moving between Pennsylvania points without a prior or subsequent interstate movement, attempted in bad faith to convert, to interstate traffic, traffic which, but for their routing, is actually in intrastate commerce subject to the laws of Pennsylvania.

We do not believe, however, that an order directed against such intrastate transportation would be appropriate in these proceedings inasmuch as we have no jurisdiction over intrastate commerce, and the physical operations involved, as actually conducted, violate no provision of the Interstate Commerce Act.

In Nos. MC-113933, MC-71536, and MC-71536 (Sub-Nos. 1, 2 and 3), we find that the considered operations by petitioners between the Pennsylvania points involved through points in New Jersey in the transportation of property both originating and terminating at points within Pennsylvania, are, but for their routing, actually in intrastate commerce; and that the petitions in these proceedings, to the extent that they seek an interpretation or order to the contrary, should be denied.

In Nos. MC-C-2671 and MC-C-2696, we find (1) that the challenged operations by the respective defendants between points in Pennsylvania through points in New Jersey in the transportation of property originating or terminating at points without Pennsylvania is authorized by their certificates; and that these complaints, to the extent that they embrace such activities, should be dismissed, and (2) that the challenged operations by defendants between the points in Pennsylvania involved, through points in New Jersey, in the transportation of property both originating and terminating at points within Pennsylvania are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania; that they are not in violation, however, of the Interstate Commerce Act; and that these complaints, to the extent that they embrace such activities, also should be dismissed, to the extent not adjudicated herein.

An appropriate order will be entered.

COMMISSIONER GOFF did not participate.

APPENDIX

Certificate No. MC-71536

Between New York, N. Y., and points in Pennsylvania, as follows:

(G)—From New York over irregular routes to Paterson, N. J., thence over U. S. Highway 46 to Hackettstown, N. J., thence over New Jersey Highway 24 to Phillipsburg, N. J., thence over U. S. Highway 22 via Easton, Pa., to Allentown, Pa., thence over U. S. Highway 309 to junction Pennsylvania Highway 29, thence over Pennsylvania Highway 29 via Hazleton, Pa., to junction Pennsylvania Highway 93, thence over Pennsylvania Highway 93 to Berwick, Pa., thence over U. S. Highway 11 via Danville, Pa., to Northumberland, Pa.

(F)—From New York as specified above to Allentown, Pa., thence over U. S. Highway 22 to Hamburg, Pa., thence over U. S. Highway 122 to Sunbury, Pa., thence over Pennsylvania Highway 14 to Williamsport, Pa., and thence over U. S. Highway 220 to Lock Haven, Pa.;

From New York as specified above to Danville, Pa., thence over Pennsylvania Highway 54 to Elysburg, Pa., and thence over Pennsylvania Highway 242 to Paxinos, Pa.

(E-2)—From New York as specified above to Hackettstown, N. J., thence over U. S. Highway 46 to Portland,

Pa., thence over U. S. Highway 611 to Scranton, Pa., and thence over U. S. Highway 11 to Berwick, Pa.;

From New York as specified above to Scranton, Pa., and thence over U. S. Highway 6 to Carbondale, Pa., and thence over Pennsylvania Highway 70 to Forest City, Pa.

(E-1)—From New York as specified above to Easton, Pa., thence over U. S. Highway 611 to Stroudsburg, Pa., thence over U. S. Highway 209 to junction Pennsylvania Highway 115, and thence over Pennsylvania Highway 115 to Kingston, Pa.;

From New York as specified above to Allentown, Pa., and thence over U. S. Highway 309 to Wilkes-Barre, Pa.;

From New York as specified above to Allentown, Pa., thence over U. S. Highway 309 to junction Pennsylvania Highway 563, thence over Pennsylvania Highway 563 to junction unnumbered highway, thence over unnumbered Highway to Red Hill, Pa., thence over Pennsylvania Highway 29 to Hereford, Pa., thence over Pennsylvania Highway 100 via Pottstown, Pa., to junction Pennsylvania Highway 83, thence over Pennsylvania Highway 83 to junction Pennsylvania Highway 683, and thence over Pennsylvania Highway 683 to Spring City, Pa.;

From New York as specified above to Allentown, Pa., and thence over U. S. Highway 222 to Ephrata, Pa., and

Return over the above specified regular routes to Paterson, N. J., thence over irregular routes to New York.

(H)—Service is authorized to and from all intermediate points on the above-specified routes, and to and from the off-route points of Boonton, Belvidere, and Oxford, N. J., Nuremberg, Sheppton, Mifflinberg, Middleburg, Bearbortown, White Haven, Perkasie, Stowe, Gilbertville, Topton, Fleetwood, West Reading, Sinking Spring, Denver and Mahton, Pa., those in New Jersey within 35 miles of Columbus Circle, New York, N. Y., and those within ten miles of each of the following points: Phillipsburg, Allentown, Danville, Forty Fort, Hazleton, Scranton, Shamokin, Stroudsburg, Sunbury, and Williamsport, Pa.

Certificate No. MC-71536

(Sub-No. 1)

(D)—Between Easton, Pa., and Wernersville, Pa.;

From Easton, over U. S. Highway 22 to Allentown, Pa., thence over U. S. Highway 222 to Reading, Pa., thence over U. S. Highway 422 to Wernersville, Pa.; and return over the same route.

Service is authorized to and from the off-route points of Emmaus, Macungie, Topton, Fleetwood, Hamburg, Hellertown, and Pottstown, Pa.

(E)—Between Allentown, Pa., and Scranton, Pa., as follows:

From Allentown over U. S. Highway 309 via Mauch Chunk, Pa., to Hazleton, Pa., (also from Mauch Chunk over U. S. Highway 209 to Tamaqua, Pa., thence over Pennsylvania Highway 29 to Hazleton), thence over U. S. Highway 309 to Pittston, Pa., and thence over U. S. Highway 11 to Scranton;

From Allentown over U. S. Highway 22 to Bethlehem, Pa., thence over unnumbered highway to Bath, Pa., thence over Pennsylvania Highway 45 to Nazareth, Pa., thence over Pennsylvania Highway 12 to Wind Gap, Pa., thence over Pennsylvania Highway 702 to Bangor, Pa., thence over Pennsylvania Highway 712 to junction U. S. Highway 611, and thence over U. S. Highway 611 to Scranton; and

Return over these routes to Allentown.

Service is authorized to and from the off-route points of Summithill, Mt. Carmel, Pottsville, Schuylkill Haven, Orwigsburg, Ashland, Shenandoah, Girardville, Frackville, Port Carbon, Mahonoy City, Duryea, Olyphant, Taylor, Luzerne, Old Forge, Plymouth, Kingston, West Pittston, Freeland, Centralia, St. Clair, New Philadelphia, and Throop, Pa.

(C-1)—Between Allentown, Pa., and Morrisville, Pa., as follows:

From Allentown over U. S. Highway 309 to Quakertown, Pa., thence over Pennsylvania Highway 313 to junction Pennsylvania Highway 113, thence over Pennsylvania Highway 113 to Dolyestown, Pa., thence over U. S. Highway 202 to New Hope, Pa., and thence over Pennsylvania Highway 32 to Morrisville;

From Allentown over U. S. Highway 309 to Sellersville, Pa., thence over Pennsylvania Highway 813 via Telford, Pa., to junction Pennsylvania Highway 63, thence over Pennsylvania Highway 63 via Hatfield, and Lansdale, Pa., to junction U. S. Highway 202, thence over U. S. Highway 202 to Buckingham, Pa., thence over Pennsylvania Highway 113 to Newtown,

Pa., thence over Pennsylvania Highway 532 to Yardley, Pa., and thence over Pennsylvania Highway 32 to Morrisville; and

Return over these routes to Allentown.

Service is authorized to and from the off-route point of Silverdale, Pa.

Between Pennsylvania points and points in New Jersey as follows:

From Easton, Pa., over unnumbered highways via Phillipsburg, Alpha, Warren Glen, and Spring Mills, N. J., to Milford, N. J.;

From Portland, Pa., across the Delaware River to junction New Jersey Highway 8, thence over New Jersey Highway 8 to Columbia, N. J.,

From New Hope, Pa., over U. S. Highway 202 to Lambertville, N. J., thence over unnumbered highway via Titusville, N. J., to Trenton, N. J.;

(B-1)—From Morrisville, Pa., over U. S. Highway 1 to Trenton, N. J., thence over unnumbered highway via Titusville, N. J., to Lambertville, N. J.;

(C)—From Easton, Pa., over U. S. Highway 22 via Phillipsburg, Clinton, and Clinton Corners, N. J., to Plainfield, N. J.;

From Easton across the Delaware River to junction New Jersey Highway 24, thence over New Jersey Highway 24 to junction New Jersey Highway, S24, thence over New Jersey Highway S24 to Hackettstown, N. J., and thence over U. S. Highway 46 to Netcong, N. J., and

Return over these routes to the above-specified Pennsylvania origin points.

(B)—Between Clinton, N. J., and Trenton, N. J.:

From Clinton over U. S. Highway 22 to junction New Jersey Highway 69, thence over New Jersey Highway 69 to Trenton, and return over the same route.

Between Scranton, Pa., and Endicott, N. Y.:

From Scranton over U. S. Highway 11 to Binghamton, N. Y., thence over New York Highway 17C to Endicott, and return over the same route.

Service is authorized to and from all intermediate points on the above-specified routes.

Certificate No. MC-71536 (Sub-No. 3)

Regular Route:

(A)—*General commodities*, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Philadelphia, Pa., and New York, N. Y., serving all intermediate points:

From Philadelphia over U. S. Highway 1 to Newark, N. J., and thence over city streets and connecting highways to New York, and return over the same route.

Irregular Routes:

(A-1)—General commodities, except those of unusual value, Class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment,

Between Philadelphia, Pa., on the one hand, and on the other, points within 15 miles of Philadelphia, Pa.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 30th day of November, A. D. 1960.

No. MC-C-2671
PENNSYLVANIA PUBLIC UTILITY COMMISSION
v.
HUDSON TRANSPORTATION COMPANY

No. MC-C-2696
PENNSYLVANIA PUBLIC UTILITY COMMISSION
v.
ARROW CARRIER CORPORATION

No. MC-113933
HUDSON TRANSPORTATION COMPANY—
PETITION FOR DECLARATORY ORDER

No. MC-71536
ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 1)
ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 2)
ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

No. MC-71536 (Sub-No. 3)
ARROW CARRIER CORPORATION—
PETITION FOR DECLARATORY ORDER

It appearing, That the above-titled proceedings numbered MC-C-2671 and MC-C-2696 being at issue upon complaints and answers on file, and full investigation of the matters involved having been made;

It further appearing, That upon consideration of the certificates bearing the numbers MC-113933, MC-71536, and MC-71536 (Sub-No. 1, 2, and 3), and of petitions of the above named carriers for declaratory orders pursuant thereto, or interpretations thereof, and good cause appearing therefor;

And it further appearing, That the said division, on the date hereof, has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby made a part hereof:

It is ordered, That said petitions, except to the extent granted in said report, be, and they are hereby, denied.

And it is further ordered, That said complaints be, and they are hereby, dismissed, except to the extent they are adjudicated in said report.

By the Commission, division 1.

Harold D. McCoy,
Secretary.

(Seal)

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No. 467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

ARROW CARRIER CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the District of New Jersey

MOTION TO AFFIRM OF THE PENNSYLVANIA RAILROAD COMPANY, HIGHWAY EXPRESS LINES, INC. AND MODERN TRANSFER CO., INC.

MORGAN, LEWIS & BOCKIUS
2107 Fidelity-Phila. Trust Bldg.
Philadelphia 9, Pa.
Of Counsel

ERNEST R. VON STARCK
ROBERT H. YOUNG
Counsel for Highway Express Lines, Inc. and Modern Transfer Co., Inc.

CARL HELMETAG, JR.
1138 Transportation Center
Six Penn Center Plaza
Philadelphia 4, Pa.
Counsel for The Pennsylvania Railroad Company

International Printing Co., 711 So. 50th St., Phila. 43, Pa.

TABLE OF CONTENTS

	Page
STATEMENT	1
ARGUMENT	7
A. The Procedure Followed by the Interstate Commerce Commission Was Precisely That Approved by the Court	7
B. The Interstate Commerce Commission's Finding That Appellant's Operations Were Not Bona Fide Interstate Commerce and Constituted a Subterfuge Was Reasonable and Therefore Lawful	8
1. The Use of an Interstate Route Is Not Bona Fide and Constitutes a Subterfuge Where There Is No Logical Operating Reason for It and the Motivation for Such Use Is the Avoidance of State Regulation	9
2. The Finding of the Commission That Appellant's Interstate Route Is Not Bona Fide Is Justified by the Facts	16
CONCLUSION AND REQUEST FOR RELIEF	18
PROOF OF SERVICE	19

TABLE OF CASES

	Page
Atlantic Freight Lines, Inc.—Petition for Declaratory Order, 51 M.C.C. 175 (1949)	13
Central Greyhound Lines v. Mealey, 334 U.S. 653	15
Dixie Freight Lines, Inc., Common Carrier Application, 24 M.C.C. 783 (1940)	13
Eichholz v. Public Service Commission of Missouri, 306 U.S. 268	11
H. C. Gabler, Inc., Ext.—Cement From Md. and Pa. Counties, 86 M.C.C. 447	14
ICC v. J-T Transport, Inc., 368 U.S. 81, 90 (1961)	17
Jones Motor Co., Inc. v. U. S. A. and I. C. C. (Civil Action No. 32629, D. C. E. D. Pa. 1963)	18
Riss & Co. v. United States, 117 F. Supp. 296 (D.C. Mo. 1952), aff'd 346 U.S. 890	17
Rochester Telephone Corp. v. United States, 307 U.S. 125	9
Roundtree v. Terrill, 22 F. Supp. 299 (N.D. Tex. 1938)	15
Service Storage and Transfer Co., Inc. v. Virginia, 359 U.S. 171	7, 9, 11, 12, 16, 18
Young's Motor Trucking Service, Inc., Extension—Cement No. MC-79476 (Sub. No. 18) (mimeo. May 1, 1961)	16

STATUTES CITED

	Page
Interstate Commerce Act:	
Section 202(b), 49 U.S.C. § 202(b)	9, 10
Section 203(a)(10), 49 U.S.C. § 303(a)(10)	9
Section 203(c), 49 U.S.C. § 303(c)	2
Section 204(c), 49 U.S.C. § 304(c)	7, 8, 10
Section 206(a)(1), 49 U.S.C. § 306(a)(1)	2
Public Utility Law, Act approved May 28, 1937, P.L. 1053:	
Section 202(b), 66 P.S. 1122	2
Section 202(c), 66 P.S. 1122	2

MISCELLANEOUS

	Page
9 Wigmore Evidence, Section 2486 (3rd Ed. 1940)	7

IN THE

Supreme Court of the United States.

ARROW CARRIER CORPORATION, *Appellant*

v.

UNITED STATES OF AMERICA

and

INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal From the United States District Court for the District of New Jersey

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MOTION TO AFFIRM OF THE PENNSYLVANIA RAILROAD COMPANY, HIGHWAY EXPRESS LINES, INC. AND MODERN TRANSFER CO., INC.

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, The Pennsylvania Railroad Company, Highway Express Lines., Inc., and Modern Transfer Co., Inc. move that the judgment of the district court be affirmed.

STATEMENT

This case was initially adjudicated by the Interstate Commerce Commission (ICC) following a consolidated proceeding upon a Petition for Declaratory Order filed by Appellant and a complaint filed by the Pennsylvania Public Utility Commission (PUC). Appellant's Petition sought declaratory orders acknowl-

edging its ICC authority to conduct operations between points in Pennsylvania over interstate routes traversing New Jersey. The complaint of the PUC charged that Appellant was transporting property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey without first having obtained appropriate certificates of public convenience and necessity from the ICC as required by Sections 203(c) and 206(a)(1) of the Interstate Commerce Act (49 U.S.C. § 303(c) and 49 U.S.C. §306 (a)(1)) or having obtained a certificate from the PUC as required by Sections 202(b) and 202(c) of the Public Utility Law of Pennsylvania (Act approved May 28, 1937, P.L. 1053, 66 P.S. 1122). Pennsylvania Railroad, Highway Express Lines, Inc., and Modern Transfer Co., Inc. were intervenors in support of the PUC complaint.

Following hearings, the ICC Examiner served a Recommended Report and Order wherein he found that Appellant's operations between points in Pennsylvania through New Jersey were not authorized by their certificates, that they were engaged in that traffic without proper authority and in violation of Section 206(a)(1) of the Interstate Commerce Act and that a cease and desist order should issue.[1] On December 7,

1. The Examiner summarized some of the contentions made by complainants against Arrow to establish subterfuge, as follows:

> ". . . subterfuge by . . . Arrow is shown . . . (b) by the handling of a substantial volume of intrastate traffic which moves solely between an origin point in Pennsylvania and a destination point in the same State, (c) by advertising direct service on shipments of this traffic, (d) by the movement of this traffic on regular runs daily over regular routes via points in New Jersey with no stops in that State to pick up or deliver freight, except the stops made by Arrow at its Phillipsburg

1960, the ICC, Division 1, reconsidered the matter and concluded that Appellant's operations, but for their routing, were actually intrastate commerce and that Appellant's Petition for Declaratory Order to the contrary should be denied. The Division further concluded that Appellant's operations were a bad faith attempt to convert to interstate traffic that which was really intrastate, but that since the operations were conducted pursuant to the carrier's interstate certificates a cease and desist order could not be issued.

On further reconsideration, the entire ICC, by Order dated March 27, 1962, concluded that this was a case of subterfuge to defeat the regulatory laws and policies of Pennsylvania and that an order should be entered requiring the Defendant to cease and desist performing those operations which were not bona fide interstate in character.

The controlling facts under which Appellant conducts its operations are not seriously disputed. Appellant admits that it conducts regular operations between Philadelphia and various other points in Pennsylvania including particularly Scranton and Allentown over a New Jersey routing. Appellant further admitted that as of October, 1959 it averaged three or four truckloads a night over these routes in each direction and that no New Jersey stops to pick up

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terminal, (e) by the transportation of this intrastate traffic over interstate routes which are about 100 percent longer than the existing intrastate routes from Philadelphia to Allentown, and somewhat longer than the existing intrastate routes from Philadelphia to Scranton, and (f) by admissions on the part of . . . Arrow that if no intrastate authority or interstate authority was required for the movement of this traffic, [this carrier] probably would transport the freight over the shorter and more direct intrastate routes . . ."

and deliver goods were made on these runs. The interstate route used by Appellant is 110 miles between Philadelphia and Allentown [2] and 160 miles between Philadelphia and Scranton [3] as compared to 52 miles and 130 miles respectively using the intrastate routes.[4] The interstate driving times are 3½ and 5.10 hours respectively compared to intrastate driving times of 1 hour and 4½ hours respectively.

Appellant's service between Philadelphia and various Pennsylvania points is not physically surreptitious. The service is publicly advertised, the tariffs are published and solicitors stationed at Philadelphia, Allentown, Scranton and other points seek the business. However, there is no logical or normal operating reason for the interstate routing adopted by Appellant. In fact, Appellant's president clearly indicated that its operations were conducted through New Jersey only because it had ICC authority for such routing and that if there were no regulation it would take the shortest route which would be entirely in Pennsyl-

2. From Philadelphia to Trenton, N.J. over U.S. Highway 1; thence over New Jersey Highway 69 to junction U.S. Highway 22 at Clinton Corners, N.J.; thence over U.S. Highway 22, via Phillipsburg, to Easton, Pa.; and thence over U.S. Highway 22 to Allentown, Pa., and return over the same route.

3. From Philadelphia to Phillipsburg over the routes described above; thence over U.S. Highway 22 to Easton; and thence over U.S. Highway 611, via Stroudsburg, to Scranton, Pa., and return over the same route (T. 55).

4. From Philadelphia over U.S. Highway 309 to Allentown, Pa., and return over the same route.

From Philadelphia over unspecified highways to King of Prussia, Pa.; thence over U.S. Highway 202 to junction U.S. Highway 309; thence over U.S. Highway 309 to Center Valley, Pa.; thence over Pennsylvania Highway 12 to Bethlehem, Pa.; thence over Pennsylvania Highways 512 and 12, via Bath and Wind Gap, Pa., to Bartonsville, Pa.; and thence over U.S. Highway 611 to Scranton, Pa., and return over the same route (T. 52).

vania using the Pennsylvania Turnpike. Specifically, Appellant's president said:

> "Q. In view of the fact that in each of these instances your New Jersey route is longer and involves more driving time, why do you go that way? Why don't you go the short route directly through Pennsylvania?
>
> A. It is the only authority that we have, granted from the ICC.
>
> Exam. Hanback: Let us assume you had freight moving from Philadelphia to Easton and Scranton only and there were no regulations.
>
> Q. (By Mr. Graf) And no regulations.
>
> A. If there was no regulation, I guess you would take whatever you figured to be the—whether it was the shortest route or the one with the lowest traffic, you would take the most convenient route if there was no regulation.
>
> Q. Let us take another specific example, Philadelphia and Scranton, which way would you go? A. I would probably go over the [Pennsylvania] turnpike." (T. 215)

In its Jurisdictional Statement and in other pleadings in the case, Appellant has tried to confuse the issues by discussing its pickup and delivery activities from the Philadelphia and Allentown terminals. In some instances these pickups or deliveries are made from or to New Jersey points. But the lawfulness of these interstate movements is not challenged and the ICC specifically upheld them. There is no evidence, however, that the traffic between points in Pennsylvania is essential to the continued operation of the interstate transportation from New Jersey to Pennsylvania. In fact, it is clear from the record that the bulk

of the traffic over the disputed route involves movements solely from one point in Pennsylvania to another in the same state.

The evidence of record is also clear as to the nature of Appellant's authority. Appellant never applied to the ICC for rights to transport traffic from Philadelphia to other Pennsylvania points through New Jersey. Its authority to follow the routes in question is based upon the "tacking" of five or six separate rights acquired at different times by Appellant or some predecessor company. The convenience and necessity for the protested transportation by Appellant, therefore, have never been considered by the ICC.

Based upon the foregoing, the issue in the case is simple. Where a motor carrier can piece together an interstate route for traffic between points in a single state by tacking various authorities acquired from the ICC, can the ICC find that the operations are not bona fide interstate traffic and order them discontinued if there is no logical or normal operating reason for the interstate routing?

Faced with this simple question, a three-judge District Court composed of Third Circuit Judge McLaughlin and New Jersey District Court Judges Wortendyke and Lane affirm the action of the ICC in ordering Appellant to cease and desist performing the illegal transportation. The decision attached to Appellant's Jurisdictional Statement (page 1A) answers all of the points raised by the Jurisdictional Statement. The Pennsylvania Railroad, Highway Express Lines, Inc. and Modern Transfer Co., Inc. were intervening defendants in the District Court proceeding.

ARGUMENT

A. The Procedure Followed by the Interstate Commerce Commission Was Precisely That Approved by the Court.

In *Service Storage and Transfer Co., Inc. v. Virginia*, 359 U.S. 171, this Court outlined the procedure which was followed in this case. In *Service*, the State of Virginia challenged a carrier's authority under ICC certificates to transport freight between points in Virginia over a route crossing into West Virginia. This Court held that Virginia was without power to restrict the carrier's interstate authority and further held that the interpretation of the certificate should be made by the ICC pursuant to the provisions of Section 204(c) of the Interstate Commerce Act.[5] But this Court went on to explain that the State was not without remedy and described a procedure by which relief could be secured saying:

> "Finally, the Commonwealth is not helpless to act. If it believes that petitioner's operation is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the remedy Congress has provided in the Act. Section 204(c), *supra*, note 2, authorizes the filing of a 'complaint in writing to the Commission by any . . . State board . . . [that] any . . . carrier . . .' has abused its certificate. See also *Castle v. Hayes Freight Lines, supra*." (id. at 179)

This Court thus recognized that carrier operations which are not bona fide interstate but are conducted as

5. 49 U.S.C. § 304(c).

a subterfuge to escape State jurisdiction violate the Interstate Commerce Act and that therefore the Commission, under Section 204(c) has jurisdiction to investigate such violations and to issue appropriate orders compelling their discontinuance.[6]

In this case, the Pennsylvania Public Utility Commission followed the approved procedure. It filed a complaint under Section 204(c) alleging that Appellant's operation was not bona fide interstate but merely a subterfuge to escape State regulation. The ICC found that Appellant was abusing its certificates as alleged and ordered it to cease and desist. The procedure followed by Pennsylvania being correct, the only question remaining is whether the ICC's action was lawful.

B. The Interstate Commerce Commission's Finding That Appellant's Operations Were Not Bona Fide Interstate Commerce and Constituted a Subterfuge Was Reasonable and Therefore Lawful.

In this matter, the evidence is uncontradicted. The only issue is whether upon those facts the Commission's finding, that the involved movements were not bona fide interstate transportation and constituted a subterfuge to avoid State regulation, was reasonable.

6. Section 204(c) provides: "Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith".

If the finding was reasonable, then under the teaching of *Service*, the order of the Commission was correctly sustained by the Court below, and the judgment of that Court should be here affirmed. See *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 146.

1. The Use of an Interstate Route Is Not Bona Fide and Constitutes a Subterfuge Where There Is No Logical Operating Reason for It and the Motivation for Such Use Is the Avoidance of State Regulation.

Appellant contends, that any transportation must be considered bona fide if, on their face, the carrier's certificates permit it, and that subterfuge can only be established by proof that the carrier has operated in an underhanded or surreptitious manner. There is no basis for this position.

The definition of interstate commerce in Section 203(a)(10) of Part II of the Interstate Commerce Act (49 U.S.C. § 303(a)(10)) includes commerce between places in the same state through another state. But the Act also contains Section 202(b) (49 U.S.C. § 202(b)) which provides:

> "Nothing in this part shall be construed . . . to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

If Sections 202(b) and 203(a)(10) are read together, as they must be, it becomes obvious that Congress does not intend the ICC to authorize transpor-

tation between places in the same state through another state and thus eliminate State regulation, unless there exist logical operating reasons for making the movement interstate rather than intrastate. Any other interpretation of the law would place the ICC in a position to oust State jurisdiction contrary to the Congressional intent expressed in Section 202(b).[7]

If State regulation of intrastate commerce by motor carriers is to be preserved, as Section 202(b) requires, a carrier seeking a certificate for an interstate route on traffic moving between points within a single state must show that such route is feasible, practical and not simply a device to avoid State regulation. Conversely, in exercising its powers under Section 204(c) to determine whether already existing certificates are being abused, the ICC may properly conclude that abuse exists where the evidence of record establishes no logical operating reason for the use of interstate certificates to perform what is essentially an intrastate service.

For example, under Appellant's theory every carrier with interstate rights between Ohio and New York via Pennsylvania routes—and there are many such carriers—could handle intrastate shipments between Philadelphia and Pittsburgh merely by following its authorized route across the State and then crossing the

7. The Federal Motor Carrier Act of 1939 (Part II of the Interstate Commerce Act) was created and designed to fill the "gaps" between state regulation which was powerless to deal with interstate operations. The House Committee Report (H. R. Rep. 1645—74th Congress to accompany S. 1629, 74th Congress, which became the Motor Carrier Act of 1935), stated: "S. 1629 fills the gap in motor carrier regulation as between the States . . ." This purpose would be defeated it the Act was used to defeat state jurisdiction over transportation which is in reality intrastate.

Delaware River to Camden, N.J. and returning to Philadelphia. The carrier would be following the routes in its interstate certificates and the operation could be conducted openly under published tariffs. But if this were permissible, state regulation would be drastically undermined and might well be destroyed. To avoid this result, it is right that the Commission should have the power to restrict the use of interstate certificates to reasonable, practical and sensible movements, even though apparent authority for such operation is claimed by tacking a series of grants of authority separately issued without approval of the combined routing.

Appellant in its Jurisdictional Statement alleges that the District Court has erroneously relied upon *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268. A reading of the District Court decision shows no reliance on that case, except as one source of comment on "bona fide operations". Appellant also cites the *Service* case and others to support its position that transportation between two points in a single state through another state is interstate commerce. An examination of these decisions, however, will show that the routing between points in a single state through another state has been approved only where a logical operating reason exists for such routing so as to make the interstate commerce bona fide.

The *Service* case itself involved a situation where a carrier maintained its headquarters in Bluefield, West Virginia, and was conducting operations between points in Virginia through Bluefield, West Virginia. Its main activity in conducting these operations was

the movement of less-than-truckload shipments. All of the traffic directed through the Bluefield, West Virginia, terminal was consolidated both for movements between points wholly within the State of Virginia and between points in other states. Although only 3% of the total traffic transported was moving between points in Virginia, that traffic was consolidated with other traffic moving between other points.

This Court, in finding that the questioned operations were not intrastate transportation stated, by way of dictum, that the considered operation (1) was practical, efficient, and profitable, (2) created a flow of traffic which was a timesaver to the shipper, and (3) provided a unique service for less-than-truckload shipments for Central Virginians who otherwise would suffer long delays on deliveries or would be compelled to ship by truck at higher rates. Comparison of the facts of the *Service* case with those here discloses a total lack of similarity. Here, Appellant (1) does not maintain an out-of-state terminal, (2) does not collect traffic at an out-of-state point to accomplish truckload quantities, (3) does not require the considered operations to sustain its interstate operations, and (4) does not maintain that the considered operations constitute a minor portion of its overall service in the involved territory. Furthermore, the record shows that Appellant's operation is not a practical, efficient and economical one, and the operation of Appellant does not provide the shipping public with a service which otherwise would not be available. For these reasons, it must be concluded that the *Service* case, rather than indicating that the questioned operation is bona fide, demonstrates vividly that Appellant's operation is conducted only as a subterfuge to avoid state regulation.

Appellant's operations also compare unfavorably with the other decisions cited in their Jurisdictional Statement.

In *Atlantic Freight Lines, Inc.—Petition for Declaratory Order,* 52 MCC 175 (1949), a question arose concerning the interpretation of authority which had been granted in a "grandfather" application proceeding. There, applicant had sought authority to conduct operations between all intermediate points on a route, the termini of which were in different states. After exhaustive hearings, the Commission issued a certificate authorizing operations over the involved route with the right to serve most of the intermediate points. Under this certificate, operations were conducted between points in the same state. Based upon these facts, the Commission, in the *Declaratory Order* proceeding, at pages 189-190, found:

> "That there was no subterfuge and that it is bona fide interstate commerce was found to be the fact in the reports pursuant to which the certificate was issued; indeed, such a finding was indispensable to the grant of the type of authority requested, for it is by the statute made a prerequisite thereto."

A similar situation was presented, and conclusion reached, in *Dixie Freight Lines, Inc., Common Carrier Application,* 24 MCC 780, 783 (1940). The only discernible difference between the facts there and those in *Atlantic Freight Lines* was that the applicant sought and was granted specific authority to *extend* its operations in such a manner as to create a route which had its termini in the same state but which extended through another state. In finding that operations over this route between points in the same state were bona fide, the Commission, at page 783, stated:

> "[To restrict the operations here proposed] * * * would be contrary to our general policy relative to extension applications, wherein we customarily describe only the proposed route as extended, and if such route is authorized the motor carrier has the right to transport interstate commerce over it to or from any point on its existing routes. This policy avoids duplication of authority."

In *H. C. Gabler, Inc., Ext.—Cement from Md. and Pa. Counties*, 86 MCC 447 (1961) certain of the applicants sought authority from origins in a specific state to destinations within the same state. The Commission, in finding that the authority sought should be granted, at page 484, stated:

> "Authority to serve destination points in the same State as the origin is located is granted uniformly where sought, for the evidence establishes that such authority is generally required to enable applicants to utilize more feasible and economical interstate routes and to accord shippers greater flexibility in diverting shipments already en route."

Rather than supporting Appellant's position, the *Gabler* case illustrates that an interstate certificate which provides a route between points within a single state can be considered as authority to conduct operations between those points only when the Commission specifically has authorized such operations based on valid reasons.

The facts presented in *Roundtree v. Terrill*, 22 F. Supp. 299 (N.D. Tex. 1938), further illustrate the difference between "bona fide" entry into a second state and entry which is a "subterfuge". There, the carrier held regular route authority between Dallas, Texas,

and Little Rock, Arkansas, via Texarkana, Texas-Arkansas. Texarkana is a city which is situated partly in Texas and partly in Arkansas. In conducting operations between the termini, certain shipments were transported from Dallas to Texarkana, Texas, a distance of over 180 miles, in line-haul equipment. These shipments arrived at Texarkana during the night and were taken directly to the carrier's warehouse in Texarkana, Arkansas, for overnight storage and delivery the following morning in pickup and delivery vehicles. The warehouse was located only two and a half to three blocks from the Texas State line. The court found that such operations constituted "bona fide" interstate transportation.

Central Greyhound Lines v. Mealey, 334 U.S. 653, can easily be distinguished, not only on the grounds that it did not concern interstate commerce as regulated by the Commission but, also, because the question of subterfuge was not at issue. In this regard, the following is pertinent:

> "There is no suggestion here that the interstate routes were utilized as a means of avoiding even in part New York's taxation. Compare, *e.g.*, *Eichholz v. Public Service Commission of Missouri*, 306 U.S. 268, and *Ryan v. Pennsylvania Public Utility Commission*, 143 Pa. Super. 517. We are not dealing with a necessary deviation or a calculated detour." (*id.* at 660)

Although not cited by Appellant, the principle is also evidenced in *Young's Motor Trucking Service, Inc., Extension—Cement* No. MC-79476 (Sub-No. 18) (mimeo. May 1, 1961), which involved an application for authority to conduct operations between points in Massachusetts over routes running through other

states. During the course of the hearing, it was demonstrated that the proposed routes were shorter than available intrastate routes, and that the use of the interstate routes would permit operating economies to be effected. In granting the authority sought, the Commission, Division 1, at Sheet 6, found:

> "An examination of the Rand-McNally Road Atlas, however, convinces us that service to numerous destination points in Massachusetts can be rendered more economically and feasibly by operation over highways located in adjoining States, and that applicant should be granted authority in order to allow it to avail itself of these obvious advantages."

In summary, this Court's decision in *Service*, as well as a long line of precedents by the ICC, establish that unless there are present logical operating reasons, it would be a violation of Section 202(b) for the ICC to issue a certificate permitting operations between points in a single state through a second state. Similarly, where such reasons are not present, the ICC has ample power to find that a motor carrier assembling an artificial or unnatural interstate route by tacking several interstate rights is abusing its certificate. Thus, the only question remaining is whether under the particular facts of record the ICC's conclusion that a valid operating reason did not exist was justified.

2. The Finding of the Commission That Appellant's Interstate Route Is Not Bona Fide Is Justified by the Facts.

As indicated in the Statement of the Case, Appellant's route through New Jersey is almost twice as

long in mileage and in time as the logical intrastate route would be. Moreover, Appellant carries a substantial volume of goods between points in Pennsylvania over this route without any stops in New Jersey, and there is no evidence that traffic moving between Pennsylvania points is essential to permit Appellant to economically transport traffic between New Jersey and Pennsylvania. Finally, it is clear from the testimony of Appellant's president that the interstate route is used only because Appellant lacks proper intrastate authority from Pennsylvania. In spite of this extensive evidence with respect to the nature of its operations, Appellant produced no logical operating reason for using the interstate route. The ICC and the District Court therefore quite properly concluded that no such reason exists.

Appellant seeks to avoid the impact of the facts and the strength of the conclusion based upon them by contending that the District Court and the ICC have wrongly placed the burden of proof upon it. Appellant's contention is misdirected. There is no issue in this appeal regarding burden of proof. The only question is whether upon the established facts the conclusion of the Commission and the Court below was reasonable and not arbitrary.[8] As indicated before, the conclusion reached was not only logical and

8. On appeal the ICC order is presumed to be valid and the burden is on Appellant to overthrow it. See *Riss & Co. v. United States*, 117 F. Supp. 296 (D.C. Mo. 1952) aff'd. 346 U.S. 890. Moreover, even in the ICC proceeding, the burden of proving a fact should be upon the party with peculiar means of knowledge enabling him to prove such fact. See *ICC v. J-T Transport, Inc.*, 368 U.S. 81, 90 (1961); 9 Wigmore Evidence, Section 2486 (3rd Ed. 1940). The logical or normal operating reason for Appellant's circuitous interstate routing, if any, is certainly peculiarly within its knowledge, and, accordingly, the burden of proof should have been on it in the ICC proceeding.

reasonable but entirely consistent with the objectives of the Interstate Commerce Act.

CONCLUSION AND REQUEST FOR RELIEF

It is apparent that the ICC and the District Court have followed to the letter the teaching of this Court in *Service;* that no real issue of fact exists; and that no question of law is present which has not been previously settled.[9] For these reasons the appeal presents no substantial question warranting further review and therefore the judgment of the District Court should be affirmed.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS
2107 Fidelity-Phila. Trust Bldg.
Philadelphia 9, Pa.
Of Counsel

ERNEST R. VON STARCK
ROBERT H. YOUNG
Counsel for Highway Express Lines, Inc. and Modern Transfer Co., Inc.

CARL HELMETAG, JR.
1138 Transportation Center
Six Penn Center Plaza
Philadelphia 4, Pa.
Counsel for The Pennsylvania Railroad Company

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9. On June 4, 1963 the United States District Court for the Eastern District of Pennsylvania (3rd Circuit Judge Ganey dissenting) in *Jones Motor Co., Inc. v. U.S.A. and I.C.C.,* (Civil Action No. 32629) reversed an ICC order directing Jones Motor Co., Inc. to cease and desist operations which were in most respects identical to those of Arrow. The District Court for the Eastern District of Pennsylvania apparently found that operating reasons for Jones' routing were established in that record. However, the Court has granted petitions for reconsideration and reargument (to be held October 11, 1963) filed by the United States of America, the Interstate Commerce Commission, Highway Express Lines, Inc. and Modern Transfer Co., Inc., all based upon alleged errors in the interpretation of the record by the majority of the Court.

PROOF OF SERVICE

I, Carl Helmetag, Jr., Attorney for The Pennsylvania Railroad Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of October, 1963, I served copies of the foregoing Motion to Affirm on the several parties by mailing copies thereof in duly addressed envelopes, with postage prepaid, to the following:

The Honorable Robert F. Kennedy
Attorney General of the United States
United States Department of Justice
Constitution Avenue and Tenth Street, N.W.
Washington, D.C.

The Honorable Archibald Cox
The Solicitor General of the United States
Department of Justice
Washington 25, D.C.

Lee Loevinger, Esquire
Assistant Attorney General
Department of Justice
Washington 25, D.C.

John H. D. Wigger, Esquire
Department of Justice
Washington 25, D.C.

David M. Satz, Jr., Esquire
United States Attorney
Federal Building
Newark 1, New Jersey

Robert W. Ginnane, Esquire
General Counsel
Interstate Commerce Commission
Washington 25, D.C.

Stanton P. Sender, Esquire
Interstate Commerce Commission
Washington 25, D.C.

H. Neil Garson, Esquire
Interstate Commerce Commission
Washington 25, D.C.

Lum, Biunno and Tompkins
Griffith Building
605 Broad Street
Newark 2, New Jersey

Christian V. Graf, Esquire
407 North Front Street
Harrisburg, Pennsylvania

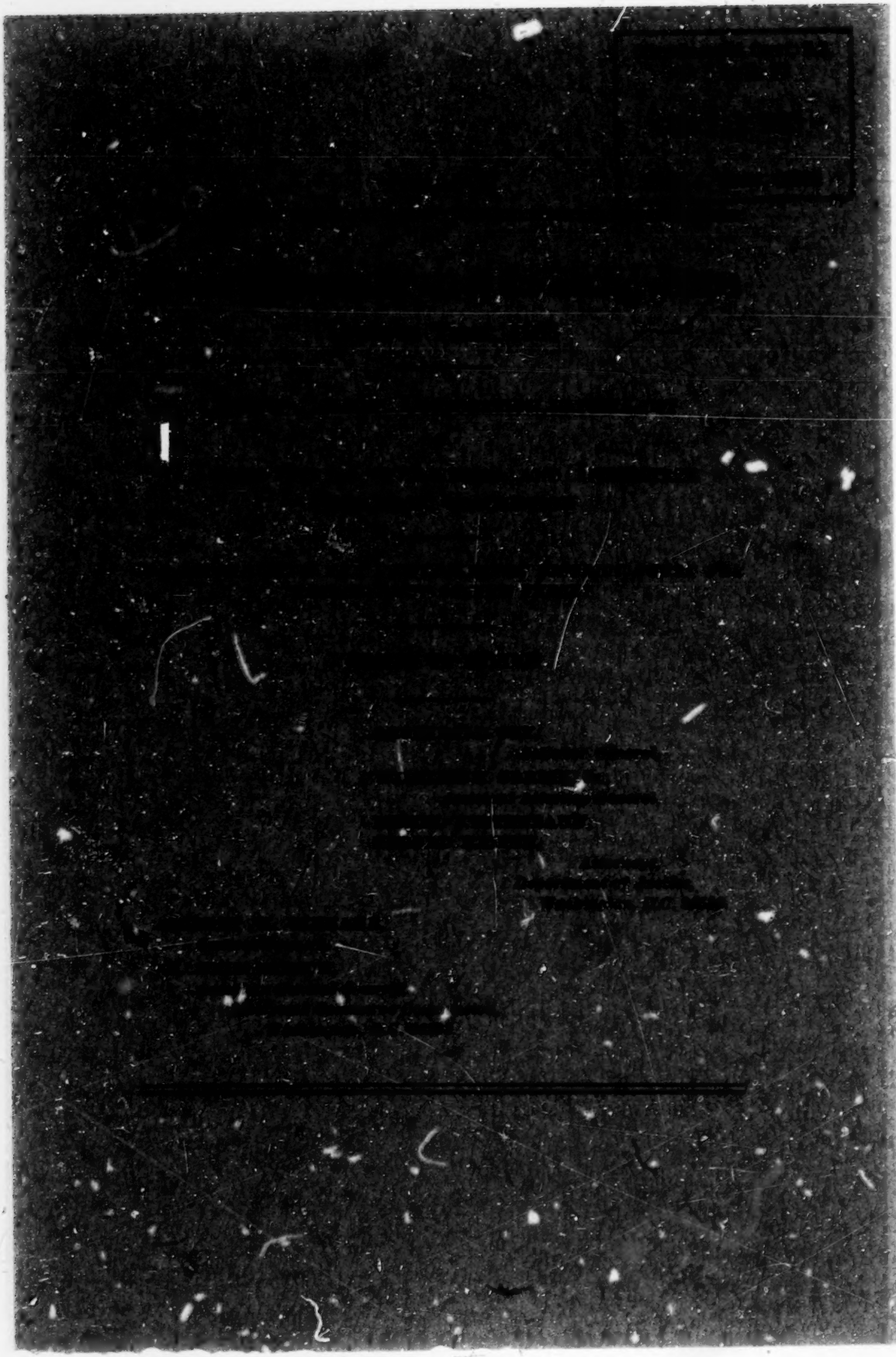
Spencer R. Liverant, Esquire
Liverant and Stewart
138 Market Street
York, Pennsylvania

John Hand, Esquire
Evans, Hand, Evans, Allabough and Amoresano
129 East Market Street
Paterson, New Jersey

William A. Goichman, Esquire
Assistant Counsel
Pennsylvania Public Utility Commission
Harrisburg, Pennsylvania

August W. Heckman, Esquire
297 Academy Street
Jersey City 6, New Jersey

/s/ CARL HELEMETAG, JR.
Carl Helmetag, Jr.



INDEX

	Page
Statement	1
Argument	5
Conclusion	10
Appendix	11

CITATIONS

Cases:

Jones Motor Co., Inc. v. *United States and Interstate Commerce Commission*, 218 F. Supp. 133 — 8, 9

Radio Corporation of America v. *United States*, 341 U.S. 412 — 6

Service Storage & Transfer Co. v. *Virginia*, 359 U.S. 171 — 4, 5, 6, 8

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Statute:

Interstate Commerce Act, 49 U.S.C., *et seq.*:

National Transportation Policy, 49 U.S.C. preceding Section 1 — 7

Part II, 49 U.S.C. 301 *et seq* — 7

Section 202(b) (49 U.S.C. 302(b)) — 7, 8

Section 203(a)(10) (49 U.S.C. 303(a)(10)) — 7, 8

Section 203(c) (49 U.S.C. 303(c)) — 2

Section 204(c) (49 U.S.C. 304(c)) — 6, 8

Section 206(a)(1) (49 U.S.C. 306(a)(1)) — 3

715-364- 63

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 467

ARROW CARRIER CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.[1]

STATEMENT

This is a direct appeal from a final judgment, entered on June 14, 1963, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325. The district court refused to set aside an order of the Interstate Commerce Commission entered in *Pennsyl-*

[1] The opinion of the district court is reported at 219 F. Supp. 43.

vania Public Utility Commission v. *Hudson Transportation Company*, Docket No. MC–C–2671, 88 M.C.C. 745,[2] requiring appellant to cease holding itself out or performing, under certificates issued by the Commission, certain operations which the Commission in its accompanying report (J.S. 17a–26a) found to be essentially intrastate in character.[3] The Commission had found that these operations by appellant (J.S. 26a) "between * * * points in Pennsylvania, through points in New Jersey, which transportation of property originates and terminates within Pennsylvania, are, but for their routing, in intrastate commerce inasmuch as they are conducted as a subterfuge to evade the laws of Pennsylvania and they are not authorized by [its] certificates." The underlying facts are as follows:

On October 8, 1959, the Pennsylvania Public Utility Commission filed a complaint with the Interstate Commerce Commission (ICC) alleging that appellant was transporting property by motor vehicle between certain points in Pennsylvania over routes through points in New Jersey, without first having obtained appropriate certificates of public convenience and necessity from the ICC as required by Sections 203(c)

[2] The report of the Commission also embraces the following proceedings: No. MC–C–2696, *Pennsylvania Public Utility Commission* v. *Arrow Carrier Corporation;* No. MC–113933, *Hudson Transportation Company—Petition for Declaratory Order;* and Nos. MC–71536 and MC–71536, subnumbers 1, 2, and 3, *Arrow Carrier Corporation—Petition for Declaratory Order.*

[3] The order of the Commission also denied appellant's petition for a declaratory order finding appellant's described operations to be lawful. (J.S. 19a, 33a.)

and 206(a)(1) of the Interstate Commerce Act (49 U.S.C. 303(c) and 306(a)(1)) and without having obtained a certificate from the PUC as required by the laws of Pennsylvania. In its reply to the complaint, appellant admitted that it was transporting property which originated at points in Pennsylvania and terminated at other points in Pennsylvania by way of routes through New Jersey.[*]

At the hearing before the Commission, it was established that (1) the driving time and distance over appellant's routes through New Jersey are almost double the direct and more convenient routes within Pennsylvania (J.S. 8a); (2) that appellant handles a substantial amount of traffic which originates and terminates at points within Pennsylvania (J.S. 7a); (3) that it advertises a direct service for traffic between points in Pennsylvania and that it openly and actively solicits such traffic (83 M.C.C. at 734); (4) that it possesses no authority from the State of Pennsylvania to carry this traffic over the shorter and more convenient routes in Pennsylvania (J.S. 9a); and (5) that, in the absence of State regulation, appellant would use the shorter and more direct intrastate routes within Pennsylvania (J.S. 8a).

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[*]The Commission, Division 1, in its report states (see Motion to Affirm by PUC 40a):

"The complaint in No. MC–C–2696 alleges, and *Arrow admits*, that from July 31, 1958, to August 23, 1958, defendant therein transported a total of 10 shipments from Scranton, Bangor, Allentown, Shamokin, Wilkes-Barre, and Swoyersville, Pa., to Philadelphia, and a total of seven shipments from the latter point to Catasauqua, Muncy, Shamokin, White Haven, and Scranton, Pa. All of the above shipments moved to some extent over routes in New Jersey. * * *" [Italics supplied.]

The hearing examiner, Division 1, and the full Commission on reconsideration, concluded that the appellant was simply using its interstate certificates as a device to convert intrastate traffic into interstate traffic, and thereby to escape regulation by the State of Pennsylvania.[5] While the Division believed that it lacked jurisdiction to restrain intrastate operations, the full Commission held that a cease-and-desist order was the proper remedy under *Service Storage & Transfer Co.* v. *Virginia,* 359 U.S. 171 (J.S. 22a–25a). The Commission stated in its Report on Reconsideration:

> We are convinced that in the absence of regulation by the Commonwealth of Pennsylvania both defendants would use the normal and direct routes between the Pennsylvania points they hold themselves out to serve. We are satisfied, as were division 1 and the examiner, that in the transportation of freight moving between Pennsylvania points without a prior or subsequent interstate movement, the defendants have attempted in bad faith to convert what is essentially intrastate commerce into interstate commerce and thus to defeat the regulatory laws and policies of the Commonwealth of Pennsylvania. In other words, this is a case of subterfuge, pure and simple [J.S. 22a].

The three-judge district court affirmed the Commission's order. It noted that the procedure followed by the Pennsylvania Public Utility Commission in filing

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[5] Report and recommended order of the Examiner issued May 16, 1960; Report of the Commission, Division 1, November 30, 1960, 83 M.C.C. 729; and Report of the Commission on Reconsideration, March 19, 1962, 88 M.C.C. 745.

a complaint with the Interstate Commerce Commission was in accord with this Court's decision in *Service Storage & Transfer Co., Inc.* v. *Virginia,* 359 U.S. 171 (J.S. 9a–10a). The Court then went on to hold that

> From all of the evidence in [this suit] the unavoidable conclusion is that the * * * Arrow routes involved are not logical and normal operations through their headquarters; that the use by * * * Arrow of [its] tacked on routes is a deliberate, calculated method employed by [it] to avoid the unfavorable consequences to them of their intrastate Pennsylvania traffic coming within the rightful jurisdiction of the Utility Commission of that Commonwealth [J.S. 11a].

The district court concluded that it was evident that appellants had abused its certificates and that the Commission was therefore justified in issuing its cease and desist order.

ARGUMENT

This appeal presents no substantial question warranting plenary review by this Court.

1. This Court has held that the Commission has the primary responsibility to determine the scope of certificates issued by it and to decide whether particular operations of certificated carriers are in abuse of their certificates because conducted as a subterfuge in order to escape state regulation. *Service Transfer Co.* v. *Virginia,* 359 U.S. 171, 177. Where a State believes that an interstate carrier's operation "is not bona fide interstate but is merely a subterfuge to escape its jurisdiction, it can avail itself of the

remedy Congress has provided in the [Interstate Commerce] Act. Section 204(c)* * * * authorizes the filing of a 'complaint in writing to the Commission by any * * * State board * * * [that] any * * * carrier * * *' has abused its certificate." *Service Transfer Co., supra,* p. 179. The instant appeal involves such a complaint by the State of Pennsylvania. The district court concluded that (J.S. 13a), "It is strongly evident from the whole of the evidence that * * * [appellant has] abused [its] disputed certificates and that the Interstate Commerce Commission was justified in so finding and in issuing its cease and desist orders". This factual determination warrants no further review by this Court. *Radio Corporation of America* v. *United States,* 341 U.S. 412, 420; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

2. The appellant complains that the Commission's finding of subterfuge is unsupported by any "affirmative evidence of bad faith, such as concealment, fraud or deceit" (J.S. 10). The short answer is that such evidence is unnecessary. The test which this Court set forth for the Commission to follow in determining whether or not a carrier has "abused its certificate" is whether a carrier's operation is a "bona fide interstate" operation or "merely a subterfuge to escape [State] jurisdiction." *Service Transfer, supra,* at 179. In cases such as this one, the inference may be drawn from an examination of the transportation factors involved, *e.g.,* the use of long and inconvenient

*49 U.S.C. 304(c).

routes without any business or economic justification except to avoid regulation by an appropriate State authority.

3. Appellant contends that its proscribed operations are bona fide on their face because they are conducted under the authority of valid, subsisting certificates. Moreover, appellant emphasizes that its transportation between two points in Pennsylvania routed through New Jersey is, by statutory definition, interstate commerce. Thus, appellant relies on Section 203(a)(10) of the Interstate Commerce Act (49 U.S.C. 303(a)(10)) which states in part that, "The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State * * *."

There is, of course, no dispute that appellant's operations were technically in interstate commerce. The question is whether this form of interstate commerce was authorized by its certificate. Section 202 (b) of the Interstate Commerce Act (49 U.S.C. 302(b)) specifically provides that the provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301 *et seq.*, shall not be construed to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."[1] In order to ac-

[1] In addition, Congress in the National Transportation Policy, 49 U.S.C. preceding Section 1, has admonished the Commission "to cooperate with the several States and the duly authorized officials thereof." See opinion of the district court, J.S. 13a.

commodate Section 202(b) with 203(a)(10), it is apparent that certificates granted to motor carriers by the Interstate Commerce Commission can authorize only bona fide interstate transportations. They cannot be used to license devices for engaging in intrastate commerce free of the regulation left to State jurisdiction by the Act. This Court held in *Service Transfer Co., supra,* that it was the Commission's function to enforce this limitation and that the States should pursue their federal remedy before the Commission (359 U.S. at 179).

4. Shortly before the New Jersey district court rendered its opinion in the instant case, a three-judge district court in Pennsylvania decided *Jones Motor Co., Inc.* v. *United States and Interstate Commerce Commission,* 218 F. Supp. 133 (E.D., Pa., June 4, 1963). The *Jones* case also involved a certificated interstate motor carrier which was transporting through New Jersey shipments originating at a point in Pennsylvania and destined to other points in Pennsylvania. The matter came before the Commission, on complaint of the State of Pennsylvania filed under the provisions of Section 204(c) of the Interstate Commerce Act (49 U.S.C. 304(c)). The Commission found that Jones' operations were not bona fide operations in interstate commerce and it entered a cease and desist order against Jones.

The majority of the reviewing court in the *Jones* case (Circuit Judge Ganey dissenting) disagreed with the Commission and found (218 F. Supp. at 138),

after passing on the evidence, that Jones was not abusing its interstate certificate. The government and intervening defendants in the *Jones* case petitioned for rehearing. The matter was reargued before the district court. On November 21, 1963, the district court issued its opinion and order on rehearing, in which the majority reaffirmed its prior decision.* We are informed that the State of Pennsylvania intends to take an appeal from the decision in *Jones*.

Whatever may be the merits of the district court's decision in the *Jones* case, it is clear that there is no conflict between that case and the instant one on the question of the Commission's power to issue cease and desist orders prohibiting the tacking of federal operating authorities as a subterfuge to avoid State regulation of intrastate commerce. The issue in *Jones* was whether the facts there supported the Commission's finding of subterfuge. On rehearing, the *Jones* court emphasized that its reversal of the Commission was based upon its evaluation of the evidence (App., *infra*, pp. 11–12). The district court in the instant case properly distinguished *Jones* on its facts (J.S. 12a–13a, fn. 1). There is, therefore, no occasion for the Court to delay the disposition of this appeal pending the appeal in *Jones*.

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* Since the opinion and order on rehearing in *Jones* has not yet been reported, we reproduce it in the Appendix, *infra*, pp. 11–14.

CONCLUSION

This appeal presents no substantial question warranting plenary consideration and the judgment of the district court should be affirmed.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

LIONEL KESTENBAUM,
GERALD KADISH,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission.

DECEMBER 1963.

APPENDIX

In the United States District Court for the Eastern District of Pennsylvania

Civil Action No. 32629, Filed Nov. 21, 1963

JONES MOTOR CO., INC.

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

OPINION AND ORDER ON REHEARING

Before: J. CULLEN GANEY, *Circuit Judge,* and HAROLD K. WOOD and JOSEPH S. LORD, III, *District Judges*
By: WOOD, *District Judge*

On June 4, 1963, we reversed the Order of the Interstate Commerce Commission which had found the plaintiff motor carrier guilty of a subterfuge to avoid the jurisdiction of the Commonwealth of Pennsylvania.

Thereafter, we granted the defendants' petitions for rehearing and reconsideration on July 23, 1963. This rehearing was held on October 11, 1963.

The basis of our prior opinion and order was that the record failed to disclose substantial evidence to support the Commission's finding of subterfuge on the part of Jones.

When Jones carries shipments from states other than Pennsylvania to Allentown it must use its certificated route through Philadelphia and Clinton, New Jersey, to Allentown. It can use none other because

this is the only authority it has from the Interstate Commerce Commission. This route is 96.2 miles long and the driving time is 3 hours, whereas the route from Philadelphia to Allentown via Route 309 is 55 miles and requires 2 hours and 5 minutes driving time. The only remaining route wholly within Pennsylvania is the Pennsylvania Turnpike, the distance being 74.9 miles and the driving time is 1 hour and 50 minutes.[1]

It seems to be logical and normal for Jones to carry the comparatively few Philadelphia to Allentown shipments, shown on the record,[2] on its 96 mile trip rather than to delay these few shipments for several days until a larger quantity could be dispatched over a route wholly within Pennsylvania.

Were Jones to split its operation to carry the questioned traffic on one truck via Route 309[3] which is 55 miles long and the remaining shipments over its 96 mile interstate route it would result in a combined total of 151 truck miles. This hardly seems practical and efficient from the standpoint of operating economy when one truck traveling 96 truck miles could carry all the shipments in one movement. Any increased fuel expense incurred by Jones in utilizing its interstate route would be offset by a saving in fewer drivers and trucks.

Since these 22 shipments are by definition "interstate"[4] and further, since 96 truck miles are preferable to 151 truck miles, we find no evidence of bad faith in the record of this proceeding.

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[1] In *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 175 (1959), the circuitous routes utilized by the carrier were sometimes *twice* the shortest possible intrastate route. The driving times are not mentioned and apparently were not important.

[2] 22 in number.

[3] Assuming that Jones had Pennsylvania authority.

[4] *Service Transfer Co.* v. *Virginia*, *supra*, Footnote 1.

For these reasons and those outlined in our prior Opinion, we dismiss the defendants' petitions for reconsideration.

ORDER

AND NOW, this 21st day of November, 1963, the defendants' petitions for reconsideration are dismissed and our Order of June 4, 1963 is affirmed.

[s] HAROLD K. WOOD, *J.*

[s] JOSEPH S. LORD, III, *J.*

J. CULLEN GANEY, *Circuit Judge,* dissenting.

I dissent.

The distance between Philadelphia and Allentown, on appellant's certificated route—its authority from the Interstate Commerce Commission—is 96.2 miles. The intrastate distance betwen Allentown and Philadelphia on Route 309, an excellent highway, is 55 miles, a saving of some 41 miles if the appellant had the approval of the Pennsylvania Public Utility Commission. It is indisputable that the run from Philadelphia to Trenton and back to Philadelphia is a dry run in that no stops were made en route to Trenton nor at Trenton itself nor from Trenton to Philadelphia. Accordingly, this differs radically from *Service Storage and Transfer Co.* v. *Virginia,* 359 U.S. 171, where Bluefield, West Virginia, which would correspond to Trenton in the instant case, was a terminal point on the certificated route, where the truck stopped, goods were delivered from it and other goods taken aboard, which gave reason and substance for going there, all absent in the instant case. Here, the truck may well have been taken to Clinton, New Jersey, or the New Jersey side of the Tacony-Palmyra Bridge, both on the appellant's certificated route, and a much shorter distance, turned around and gone on

to Allentown and there would have been as much substance to the trip as going many miles deeper into New Jersey to Trenton.

Conceding, as is obvious, that 49 U.S.C.A. § 303(10) defines "interstate commerce" as including "commerce * * * between places in the same State through another State * * *", it must likewise be conceded that this action must not be construed in a vacuum, but that inherent in the statute is the bona fides of the transaction or commerce and that merely a dry run traversing a portion of a certificated route without rhyme or reason cannot make the "commerce" interstate and thus enable it to avoid interstate regulation.

I can see no other reason for this bizarre performance other than as a subterfuge to avoid compliance with the Public Service Commission of Pennsylvania, and I reiterate the reasons set out in my original dissent.

J. CULLEN GANEY, *Circuit Judge.*

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